NO. 91-1329

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF SHEARN MOODY JR.
Debtor.

SHEARN MOODY JR.,
Petitioner.

versus

W. STEVE SMITH, TRUSTEE,
AND JOHN S. CREENO, RECEIVER
OF EMPIRE LIFE INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Shearn Moody, Jr.
2302 Post Office Street #70
Galveston, TX 77550

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

1. Whether the Texas Property Code discriminates against single person's homestead rights under the Texas Constitution and violates the equal protection clause of the Fourteenth Amendment to the United States Constitution?

2. Alternatively, whether the Texas Constitution on homestead rights is vague and arbitrary so as to violate the equal protection clause of the fourteenth Amendment to the United States Constitution and the privileges and immunities provision of the Fifth Amendment to the United States Constitution?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

IN THE MATTER OF SHEARN MOODY JR. Debtor.	)	
SHEARN MOODY JR., Petitioner,	)	NO._____
versus	)	
W. STEVE SMITH, TRUSTEE, AND JOHN S. GREENO, RECEIVER OF EMPIRE LIFE INSURANCE COMPANY, Respondents	)	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, SHEARN MOODY JR., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit denying petition for rehearing entered February 16, 1989.

OPINION BELOW

On January 12, 1989, the Court of Appeals entered its decision affirming petitioner's claim to a homestead and denying his claim as a single person to the same amount of rural land as married persons. A copy of the slip opinion is attached hereto as *EXHIBIT "A"*.

The Court of Appeals on March 2, 1989, entered its order denying petitioner's emergency motion to withddraw counsel to proceed pro se with authority in support of petition for rehearing. A copy of the Order is attached as *EXHIBIT "B"*.

On February 16, 1989, the Court of Appeals entered its order denying petitioner's petition for rehearing. A Copy of the Order is attached as *EXHIBIT "C"*.

JURISDICTION

The jursidiction of this Court is invoked under Title 18 U.S.C. §1254(1), (2) implicated by forebearance.

Supervisory authority is alternatively sought 19 U.S.C. §1651(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV:

> No State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 12, 1989, a panel of the Fifth circuit of Appeals affirmed the ruling of the district court granting a rural homestead of 100 acres to petitioner, Shearn Moody Jr., a single male. A timely petition for rehearing was filed by petitioner seeking a review of the constitutional question claiming his entitlement to 200 acres. This was denied February 16, 1989, and notice sent to him in Fort Worth, Federal Correctional Institute. He did not receive the notice due to the fact that he left Fort Worth on or about January 21 for Houston and arrived at Harris County Jail on February 3, 1989, where he is still temporarily housed.

Not knowing if the circuit court would accept his Pleadings pro se due to the fact that counsel was of record, petitioner filed on February 21, 1989, his Emergency Motion to Withdraw Counsel To Proceed Pro Se With Authority In Support Of Petition For Rehearing. This was denied as moot on March 2, 1989.

REASON FOR GRANTING THE WRIT

Where the petitioner finds himself discriminated against as a member of a class arbitrarily denied property rights selectively given to members of another class by state statute, he is entitled to review of his claim of denial of constitutional rights.

It is petitioner's argument that the Texas Constitution insures his right to 200 acres and that the Texas Property Code is discriminatory against single adults. The Texas Constitution phrase "not more than 200 acres" did not give the legislature room to discrimanate in rural homestead acreage. This phrase was only intended to distinguish between 200 acres for a rural homestead and one acre for an urban homestead.

The lower courts erred in exercising "judicial restraint" in that it is their duty to impartially consider valid grounds which raise the Constitutional Question.

If the Texas legislature had authority to lessen the 200 acre provision, then the Texas Constitution itself would be vague and discriminatory.

It was within the mandate of the Circuit Court to refer the question to the Texas Supreme Court, as petitioner asked in his petition for rehearing. Petitioner again so urges.

It was also within the mandate of the circuit court to consider the equal protection clause of the Fourteenth Amendment as raised in the petition for rehearing. Petitioner again so urges.

What was lacking at the time was case authority. Petitioner did rely on this court's holding in *Reed v. Reed*, 404 U.S. 71, 92 251, 30 L.Ed2d 225 (1971), albiet it too late.

Because the tardiness was not his fault due to the change in his location as a federal prisoner and his very active bankruptcy and criminal cases, petitioner seeks from this court the review he did not adequately get below.

WHEREFORE, Petitioner asks this court to declare unconstitutional that certain provision of the Texas Property Code, section 41.002(b) (1) (2), on grounds that the class in (1) is unjustly enriched with property rights denied the class in (2), leaving in place only the language, "not more than 200 acres."

Additionally, Petitioner asks this court to construe his motion for leave to proceed in forma pauperis as a petition for writ of mandamus and prohibition and grant him any relief he may be due.

Respectfully submitted,

/s/ Shearn Moody Jr.

SHEARN MOODY JR. PRO SE

APPENDIX A

In the Matter of Shearn MOODY, Jr., Debtor.

W. Steve SMITH, Trustee, Appellant, and John S. Greeno, Receiver of Empire Life Insurance Co. of America, Appellant,

v.

Shearn MOODY, Jr., Appellee.

In the Matter of Shearn MOODY, Jr., Debtor.

W. Steve SMITH, Trustee, and John S. Greeno, Receiver of Empire Life Insurance Company, Appellants Cross-Appellees,

v.

Shearn MOODY, Jr., Appellee Cross-Appellant.

Nos. 87-6073, 87-6078.

United States Court of Appeals, Fifth Circuit.

Jan. 12, 1989.

Rehearings Denied Feb. 16, 1989.

Trustee sought to set aside, as fraudulent conveyance transfer of property designated by debtor as his homestead. The United States District Court for the

Southern District of Texas, Carl O. Bue, Jr., J., 77 B.R. 566, entered order denying relief, and trustee appealed. In related action, trustee objected to homestead exemption claim by debtor pursuant to Texas statute. The District Court, 77 B.R. 580, sustained objection only in part, and both parties appealed. Consolidating proceedings for purpose of appeal, the Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) under Texas law, debtor did not alienate homestead property nor extinguish homestead exemption when, in attempt to hide property from creditors, he deeded property without consideration to corporation which he owned and controlled; (2) debtor's long business and health-related trips away from homestead did not establish his abandonment thereof; (3) finding as to rural character fo property was not clearly erroneous; and (4) Texas homestead statute which differentiated between debtors who were single adults and debtors who were heads of families, by allowing the latter to claim twice as much rural land as homestead, did not violate debtor's equal protection rights.

Affirmed.

Ben B. Floyd, Bonham, Carrington & Fox, Houston, Tex., for W. Steve Smith.

Robert C. Maley, Jr., Craig J. Litherland, Sheinfield, Maley & Kay, Houston, Tex., for John S. Greeno.

Martin Paul Solomon, New York City, for appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, JOLLY, Circuit Judge, and POLOZOLA, District Judge.*

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[1] District Judge of the Middle District of Louisiana, sitting by designation.

E. GRADY JOLLY, Circuit Judge:

W. Steve Smith, trustee of the bankruptcy estate of Shearn Moody, and John S. Greeno, receiver of the Empire Life Insurance Company of America ("Empire Life"), holding the largest claim against the Moody estate, together appeal from the district court's holdings in two separate cases, first that Moody's homestead designation of certain property survives fraudulent conveyances he made in anticipation of filing bankruptcy, 77 B.R. 566, and second, that Moody was entitled to a 100-acre homestead exemption under the Texas Property Code as a single person owning rural property. 77 B.R. 580. Because we find that the district court was not clearly erroneous in its factual conclusion that Moody's homestead property was rural, and did not err as a matter of law in concluding that Moody's fraudulent conveyances did not void the 100-acre rural-homestead property exemption to which he was entitled, we affirm.

I

The district court said in one of the numerous opinions rendered in this case that this is one of the most bizarre and complicated Chapter 11 bankruptcy proceedings on record. The circumstances are admittedly complicated, and the procedural context is somewhat confusing. We present a much abbreviated version of the pertinent facts.

In 1964 Shearn Moody, Jr., the debtor, bought 575 acres of property on Galveston Island, Texas. Moody's ranch house on the property is known as 2601 8-Mile Road. In the early 1970's Moody began having financial trouble, and mortgaged the property to his family in order to obtain a family loan. In 1972, Empire Life Insurance, owned by Moody, and others filed a security fraud suit against

Moody. From 1972 through 1983, Moody then engaged in numerous complicated real estate transactions in an effort to hide his assets form this creditors.

In January 1973 the Shearn Moody Holding Corporation ("SMHC") was founded with Moody as its sole stockholder and president. SMHC's assets primarily consisted of the assets remaining after Empire Life was dissolved. Among the assets transferred to SMHC after Empire's dissolution were three-fifths of one-eighth life estate interest in the Libby Shearn Moody Trust ("Trust 57"). On August 1, 1973, Moody repaid the balance of his note to his family by borrowing money from National Western Life Insurance Company ("NWLIC"), which was owned by his brother. On that date Moody signed a promissory note in favor of NWLIC in the amount of $923,713.75. In order to secure the loan from NWLIC, Moody mortgaged to NWLIC 565 acres of the Galveston Island property by a deed of trust, keeping 10 acres. SMHC guaranteed the mortgage, and to further secure the loan from NWLIC to Moody, SMHC collaterally assigned to NWLIC a life insurance policy on Moody's life, a debenture, and one-fifth of one-eighth life estate interest in Trust 57 pursuant to an Agreement and Assignment also dated August 1, 1973.

On December 30, 1976, Empire obtained a multimillion dollar jury verdict in district court. Soon after, on January 24, 1977, Moody conveyed the 565-acre tract to SMHC by an assumption deed. The recited consideration for this 1977 conveyance was the cancellation of all debts owned by Moody to SMHC and SMHC's payment of all amounts remaining due on the promissory note signed by Moody in favor of NWLIC. On September 7, 1977, SMHC mortgaged the 565 acres for a $6 million line of credit. No funds were ever advanced, but the mortgage technically still remains in place.

On January 4, 1979, Moody designated as his homestead 199.56 acres of the original 575-acre tract of land. On May 29, 1979, Empire received final judgment of $6,319,000 in its securities suit and attempted to execute on the judgment. On June 27 Moody again executed a Designation of Homestead, this time covering 100 acres of the original 575-acre tract, and stating the it was to be effective only if the previous homestead designation were found ineffective. The same 100-acre tract had been included in the January 1979 designation. In early 1980, Moody attempted to encumber the 10-acre tract excepted from the NWLIC mortgage by granting one Mr. Stoker un undivided one-half interest in the tract, and a life estate in the remaining undivided one-half interest.

On March 18, 1982, Moody reconveyed 475 acres to SMHC, excluding the 100 acres designated as homestead on June 27, 1979. This 100 acres included the 10-acre tract reserved in 1977. On March 7, 1983, SMHC conveyed 200 acres to Moody, including most, but not all, of the property described in Moody's original homestead designation. No consideration was paid for the 1982 or 1983 transactions. On March 25, 1983, Moody again designated 200 acres of his homestead, the same 200 acres conveyed by SMHC in March 1983. On the same day, Moody executed a warranty deed on the 200 acres to Shearn Moody, Jr., as Trustee of 2601 8-Mile Road, Galveston, which was recorded on March 29, 1983.

On April 1, 1983, Moody executed a warranty deed conveying to Shearn Moody, Jr., Trustee of 2601 8-Mile Road, Galveston, all oil, gas, or other minerals, or any mineral estate that Moody then owned or might own in Galveston County. Subsequently, on May 13, 1983, Moody executed another warranty deed, conveying all his mineral rights on the 200-acre tract of land designated as his homestead to Shearn Moody, Jr., Trustee.

On June 6, Moody declared Chapter 13 bankruptcy in Texas. The proceeding was dismissed, and in November 1983, Moody filed another Chapter 13 case in North Carolina. This case was converted to Chapter 11, and through change of venue, was sent to Texas. Empire Life and Smith as trustee brought suit against Moody in an effort to recover the 200 or 100 acres designated as Moody's homestead. The district court concluded that under 11 U.S.C. § 101(48), the 200-acre conveyance by SMHC to Moody in March 1983 constituted a "transfer," and under sections 548(a)(1) and (2) of the Bankruptcy Code, the transfer constituted a fraudulent conveyance subject to avoidance. The district court concluded, however, that under Texas homestead law, sanctioned by section 522(b)(2) of the Bankruptcy Code, a homestead designation could immunize the debtor regardless of the debtor's fraudulent intent in the transaction.

Immediately after deciding this case, the district court conducted a separate trial on the issue of whether Moody's 200— and 100—acre designation of homestead was proper under Texas law. The district court found that there was no allegation that Moody had originally obtained his property fraudulently in 1964. The court further found that Moody had not abandoned his homestead rights by subsequent transactions. The conveyance from Moody to SMHC of the 565-acre tract of land by assumption deed in 1977 was void for lack of consideration because SMHC had collateralized and guaranteed the NWLIC mortgage years before. Therefore, the entire 575-acre property remained in Moody's ownership and possession following that purported conveyance. The district court found Moody's 1982 conveyance of 475 acres to SMHC and SMHC's conveyance back of 200 acres in 1983 similarly void, as obvious sham conveyances without consideration, intended to hide Moody's assets from his creditors. The district court held that because at all times Moody intended to

keep his property as his homestead, he is entitled to his homestead exemption as a matter of right under Texas law. The court then concluded that under the Texas Property Code, as a single person claiming a rural homestead exemption, Moody could designate no more than 100 acres as a homestead site.

II

On appeal, Smith and Empire Life take issue with the district court's conclusion in the first case that the Texas homestead exemption immunized SMHC's 1983 conveyance to Moody of 200 acres of land from avoidance under the Bankruptcy Code, regardless of Moody's fraudulent intent. They argue that even if Texas law does immunize a debtor's homestead, Moody lost his homestead under Texas law by either alienation or abandonment. The appellants also contend that the district court erred in the second case in holding that the trustee was not entitled to the imposition of an equitable lien on the property. Should they fail in these arguments, the appellants insist that, at the maximum, Moody is entitled to declare only one acre of his land as his homestead because he is a single person, and his property is urban.

On cross-appeal Moody insists that under the Texas Constitution he is properly due a homestead exemption of 200 acres rather than 100 acres, as found by the district court, because the Texas statutory limitation of rural homesteads for single adults, Texas Property Code § 41.022, conflicts with the more expansive provision of the Texas Constitution, article XVI, section 51. We will consider these challenges in order.

A.

Section 548(a)(1) of the Bankruptcy Code permits a creditor or trustee to set aside a transfer of debtor property

made within one year of the date of filing of the bankruptcy petition if the debtor made that transfer with actual intent to hinder, delay or defraud a creditor. Section 101(48) of the Bankruptcy Code, 11 U.S.C. § 101(48), defines "transfer" as every method, direct or indirect, of deposing of or parting with property.

Moody's numerous transactions clearly indicate a fraudulent intent to impair creditors, in violation of sections 548(a) and (b) of the Bankruptcy Code, and Moody's transfer from SMHC to himself of the 200-acre parcel occurred within one year of the date of his filing the bankruptcy petition. However, section 522(b)(2) of the Bankruptcy Code specifically allows a debtor to retain property which is exempt under state law. And, as Judge Rubin pointed out in *In re Reed*, 700 F.2d 986, 990 (5th Cir. 1983), Texas' constitutional and statutory protection of the homestead is absolute. The intent of the debtor is irrelevant to the scope of his homestead exemption under Texas law. *Id.* at 990-91.

B.

Under Texas law, homestead rights may be lost only through death, abandonment or alienation. Smith and Empire Life attack the district court's finding of a homestead exemption on the grounds that (1) Moody divested himself of his homestead by conveying portions of his property to SMHC, (2) Moody abandoned his homestead rights in the land through his attempts to convey it, and (3) Moody's mere possession of the property while legal title resided in SMHC was not enough to sustain his homestead interest.

(1)

[1] First we turn to consider whether Moody ever extinguished his homestead exemption by alienation of the

underlying property. The appellants contend that Moody's 1977 transfer of property to SMHC by assumption deed was a valid transfer because it was supported by adequate consideration. As consideration for the 1977 transfer, SMHC gave up its right of contribution against Moody as guarantor and servicer of Moody's debt to NWLIC, involving several hundred thousand dollars, and released Moody from the primary obligation on the NWLIC debt. At trial, though, Moody disavowed that there had been consideration given for the 1977 transfer, and stated that he could not remember the transfer's purpose.

The record establishes that Moody's debt to NWLIC had been paid since its inception in 1973 by the one-fifth on one-eighth life estate interest in Trust 57 which SMHC had assigned to NWLIC in 1973 in order to induce NWLIC to make Moody his 1973 loan. That assignment was to be in effect until Moody's indebtedness was fully paid. In its 1973 Agreement and Assignment, SMHC retained only a right to what remained of that life estate interest once Moody's indebtedness was fully paid.

Based on our review of the record, and particularly the wording of the 1973 Agreement and Assignment between SMHC and NWLIC, it is evident that, first, SMHC's transfer of a portion of its life estate interest in Trust 57 to NWLIC was for the valid consideration of NWLIC's making a loan to Moody, its sole stockholder. *Hovas v. O'Brien*, 654 S.W.2d 801, 802-03 (Tex.App. 14 Dist.1983)(it is well settled in Texas that consideration may be given either by the promise or by some other person either to promisor or some other person). Second, it is evident that SMHC did not exact from Moody any collateral agreement to repay or compensate it in any way for assigning that life estate interest to NWLIC to pay for the debt service on the loan. Nor is there any evidence that suggests that SMHC did not act in its own interest when assuming this obligation for its

alter ego. In short, SMHC did not acquire any basis or right to proceed against Moody for funds taken by NWLIC out of the life estate interest assigned it for payments on Moody's note. Thus, when SMHC cancelled all debts owed by Moody in 1977, Moody gained nothing and SMHC gave nothing. Nor did the 1977 transaction that released Moody as primary obligor on the note impose any new obligation on SMHC, because the life estate interest assigned to NWLIC generated more revenue than was necessary to cover the mortgage payments and taxes on the property. Furthermore, NWLIC held ample collateral security to pay off the note in the event of Moody's death, in the form of a life insurance policy with a face value of $500,000, and a debenture with an original principal sum of $225,000. Thus SMHC assumed no new liability in 1977, and hence paid no consideration for the 1977 Assumption Deed.

The parties do not argue that Moody's 1982 conveyance to SMHC was supported by valid consideration. The 1982 assumption deed to SMHC itself states that it is made in place of and as a deed of correction for the 1977 deed, which, says the 1982 deed, mistakenly excepted only 10 acres rather than 100 acres. The 1982 deed recites the same consideration as the 1977 deed—the cancellation of all debts owed SMHC by Moody. For the same reasons stated above with respect to the 1977 deed, we find that Moody's 1982 conveyance was also unsupported by any real consideration. Thus we agree with the district court's conclusion that Moody never intended to alienate, and never succeded in alienating his property either in 1977 or in 1982.

(2)

Next we consider whether Moody ever abandoned his homestead rights in his property through his attempts to convey it.

The appellants argue that abandonment is a factual issue, and use and intent are relevant in determining whether abandonment has occurred. They claim that Moody evidenced his intent to abandon the property by his various paper attempts to convey the land and by his long business and health-related trips away from it, and cite *Yamin v. Charter National Bank—Westheimer*, 65 B.R. 938 (Bankr.S.D.Tex. 1986) for the proposition that a transfer of homestead property to a corporation serves as an abandonment of the homestead, even if the previous legal owner continues to reside on the property.

[2,3] *Yamin* is clearly distinguishable. In *Yamin*, the bankruptcy court found a debtor estopped from claiming homestead rights in mortgaged property because the deed of trust signed on the property explicitly denied him any homestead interest in the residence. *Yamin* involved a bona fide transfer, rather than a fraudulent conveyance without consideration or intent to relinquish possessory rights as in this case, and turned on detrimental reliance by the mortgagee and estoppel of the mortgagor. No detrimental reliance and estoppel arguments can be offered to bring the Moody—SMHC conveyance within *Yamin* because Moody was at all times also president and sole stockholder of SMHC. In addition, although the mortgagor's intent in *Yamin* was apparently to convey, here the district court found that Moody never intended to relinquish his homestead rights. A conveyance of a homestead that is not intended to pass title and that has been simulated to shield the homestead from creditors is void. *Hughes v. Parmer*, 164 S.W.2d 576, 577 (Tex.Civ.App.—Austin 1942, no writ). A void transfer cannot constitute an abandonment of homestead rights. *McGahey v. Ford*, 563 S.W.2d 857, 861 (Tex.Civ.App.—Fort Worth 1978, writ ref'd n.r.e.). Nor do Moody's absences from the property establish abandonment as a matter of law, provided he acquired no other homestead and no showing is made that he never intended

to return to and use the premises as a homestead. *Hughes*, 164 S.W.2d at 577-78.

Smith and Empire Life also argue that Moody's 1979-80 conveyances to Mr. Stoker of an undivided half-interest in the ten-acre tract, a right of survivorship in the ten-acre tract, and a life estate in the remaining undivided half of the ten-acre tract left Moody with only a reminder interest in that property, insufficient to support a claim of homestead exemption. They contend that even if no consideration was given for the transfers, a transfer of property designed to defraud creditors passes title to the property and title is defeasible only at the instance of creditors. Therefore, Moody may not avoid the Stoker transfers. They cite *Letcher v. Letcher*, 421 S.W.2d 162 (Tex.Civ.App.—San Antonio 1967, writ dism'd), and *Ransom v. Ransom*, 252 S.W.2d 212 (Tex.Civ.App.—Fort Worth 1952, writ ref'd).

Letcher and *Ransom* do not, however, concern transfers of homestead property. Because creditors have no right of recovery against a debtor's homestead in the first instance, a conveyance of the homestead cannot be in fraud of their rights as creditors. *Hughes*, 164 S.W.2d at 577. Once again, a conveyance of homestead property that is not intended to pass title, and that is simulated to shield the homestead from creditors is void. *Id.* Further, even where a grantor conveys property underlying his homestead by effective deed, if there is no abandonment of the homestead by the grantor occupant, the grantor's creditors cannot complain that the grantor has extinguished his homestead. *Id.*

[4] The district court found Moody's transfers to Stoker, granted for the sole consideration of "love and affection," to be shams and nullities intended to protect the property from Moody's creditors. The evidence showed

that Mr. Stoker had lived in an apartment on the property since 1965, and Moody remained in occupancy of the property after the transfers. No changes whatsoever occurred as a result of the Stoker conveyances. Therefore, even if we should assume that the conveyances were valid, Moody still had a possessory interest in the property sufficient to maintain his homestead interest.

Because Moody did not successfully alienate his property by either his 1977 or 1982 conveyances to SMHC, and evidenced no intent to abandon his homestead through either his sham attempts to convey to Mr. Stoker or his business and health-related trips, the district court properly found that he has not foregone his homestead rights in his land.

C.

[5] Smith and Empire Life next argue that the district court erred in concluding that the trustee was not entitled to the imposition of an equitable lien or constructive trust on Moody's homestead property. But, as the district court noted, Texas courts distinguish between homesteads acquired with fraudulently obtained money and those that are merely augmented funds. Only the former allows for a constructive trust or equitable lien. *Bush v. Gaffney*, 84 S.W.2d 759 (Tex.Civ.App.—San Antonio 1935—no writ). Because no evidence suggests that Moody originally acquired the property by fraud in 1964, and because Moody could not "acquire" property from SMHC in 1983 which he had never properly conveyed to SMHC either in 1977 or 1982, Texas law will not allow imposition of an equitable lein. *See Curtis Sharp Custom Homes, Inc. v. Glover*, 701 S.W.2d 24, 25 (Tex.App.—Dallas—1985 writ n.r.e.).

III

We turn now to consider whether the district court erred in finding that Moody's homestead property was rural, rather than urban within the meaning of the Texas Constitution. If Moody's property is urban, Moody is entitled to only a one-acre urban homestead. If the property is rural, Moody is entitled to either a one-hundred- or two-hundred-acre homestead exemption, depending on the way the Texas Constitution is read in conjunction with the Texas Property Code.

[6,7] Whether property is rural or urban is a question of fact, and this court will reverse a district court's finding of fact only if it is clearly erroneous. On review of the record we find that there was substantial evidence adduced at trial from which the district court could conclude that Moody's property was rural. Cattle have been located on the property since the 1800's. The property owner to the south of Moody uses the land for cattle grazing and leasing horses. Neither gas nor sewer lines run directly to the property, and much of the property is wetland, difficult to develop for commercial or residential use.

[8] In considering whether the district court erred in concluding that as a matter of law Moody was entitled to only a 100—acre rural-homestead property exemption under the Texas Property Code, we note that Article XVI, section 51 of the Texas Constitution provides:

> The homestead not in a town or city, shall consist of *not more than 200 acres of land*, which may be in one or more parcels, with the inprovements thereon; the homestead in a city, town or village shall consist of a lot or lots amounting to no more than one acre of land, together with any improvements in the land; provided that the same

> shall be used for the purposes of a home, or a place to exercise the calling or business of the homestead claimant, *whether a single adult person, or the head of a family; ...*

(Emphasis added.) The Texas Property Code, section 41.002 provides:

> (a) If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than one acre of land....
>
> (b) If used for the purposes of a rural home, the homestead shall consist of:
>
> (2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres....

Moody insists that he is entitled to a 200-acre homestead exemption notwithstanding the fact that he is a single adult and his property is rural, because the Texas Constitution trumps the Texas Property Code. He argues that a later constitutional provision should control an earlier legislative enactment, and the constitutional provision was ratified in November 1973, while the statute was signed into law the previous June. For this reason, the inclusion of the homestead exemption in the constitution manifests an intent to safeguard the homestead by putting it beyond the reach of legislators.

The Texas constitutional and statutory provisions need not be read as inconsistent, however. The legislature must have perceived no conflict between the two, because the statute and the constitutional amendment were passed concurrently in May 1973. The statute did not become effective until after the ratification of the constitutional

amendment. The Texas Constitution is logically viewed as an enabling act, with the statue as its implementation, focusing on the Constitution's words "not more than 200 acres."

[9] The district court regarded Moody's argument that he was entitled to a 200-acre homestead as an equal protection challenge, but declined to strike down the Texas Property Code provision because it distinguishes between married and single people. The court concluded that Moody was entitled to only the single person homestead of 100 acres under the Texas Property Code because "well established principles of judicial restraint militate against federal court intervention in state legislation absent evidence of violations that reach constitutional magnitude."

The distinction between single adults and heads of families for purposes of the homestead exemption plainly has a rational basis, and the court did not err in refusing to interfere with the explicit provisions of the Texas Property Code, given that there is no direct conflict between those provisions and the Texas Constitution.

IV

The district court did not err in finding that Moody's homestead rights were never extinguished as a result of the many and varied fraudulent paper conveyances he made in anticipation of bankruptcy. So long as a debtor has no actual intent to abandon his or her homestead rights, conveyances which are otherwise void do not extinquish those rights.

Nor did the district court err in finding that Moody's land was rural rather than urban and applying the Texas

Property Code to limit Moody's rural homestead exemption to 100 acres. Accordingly, the judgment of the district court is AFFIRMED.

A-18

In re Shearn MOODY, Jr., Debtor.

No. 86-2314.

United States District Court,
S.D. Texas,
Houston Division.

Aug. 13, 1987.

Trustee objected to homestead exemption claimed by debtor pursuant to Texas statute. Bankruptcy proceeding was withdrawn to the District Court, and the District Court, Carl O. Bue, Jr., J., held that: (1) debtor's protracted absence from property in which he claimed homestead exemption could not be considered abandonment of homestead rights, to extent that absence was primarily for health reasons; (2) property which was located entirely within city limits nevertheless qualified as "rural" property, up to 200 acres of which could be exempted from claims of creditors; (3) Texas Homestead statute, which allowed single person to claim rural homestead exemption in only 100 acres of land, did not violate debtor's equal protection rights; and (4) deeds that were executed by debtor without consideration, in ill-considered attempt to hide homestead property from creditors, did not result in extinguishment or abandonment of debtor's homestead rights.

So ordered.

See also, 64 B.R. 594.

Ben B. Floyd, Bonham, Carrington & Fox, Houston, Tex., for trustee, W. Steve Smith.

Martin Paul Solomon, New York City, David C. Unger, Houston, Tex., for defendant.

Robert C. Maley, Jr., Sheinfeld, Maley & Kay, Houston, Tex., for intervenor, receiver of Empire Life Ins. Co.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
INTRODUCTION

CARL O. BUE, JR., District Judge.

The case before the Court is one of the most bizarre and complicated Chapter 11 bankruptcy proceedings on record. The instant matter to be addressed in this protracted litigation concerns the extent to which the Debtor Moody may claim the protection that the Texas Constitution affords property determined to be homestead pursuant to Texas law.

Moody initially filed for bankruptcy under Chapter 13 of the Bankruptcy Code in the Southern District of Texas. The case was dismissed, and Moody thereafter refiled a Chapter 13 petition in North Carolina. The case was subsequently converted to a Chapter 11 proceeding. Prior to filing under Chapter 11 in North Carolina, Moody attempted to designate approximately two hundred acres of real property in Galveston, Texas, as his rural homestead in accordance with the Texas Constitution, thereby insulating the land from the claims of creditors. Subsequent to Moody's Chapter 11 filing, the current Receiver of Empire Life Insurance Company of America (hereafter, the "Receiver" and "Empire") filed an objection to Moody's homestead designation. The Chapter 11 Trustee, W. Steve Smith (hereafter the "Trustee"), adopted the objection of Empire to Moody's claimed homestead. Venue in the

Chapter 11 case was transferred to the Southern District of Texas on January 1985. Due to the existence of rampant fraud and the bankruptcy judge's lack of contempt power under existing law, the Honorable Letitia Z. Taitte Clark recommended in June of 1986 that reference in the entire Chapter 11 bankruptcy proceeding and its related adversary proceedings be withdrawn to the District Court, a procedural step which was accomplished immediately thereafter.

On May 14, 1987 through May 20, 1987, the present lawsuit was tried on the merits to the Court. The current objection to Moody's claimed homestead exemption is integrally related to the Trustee's complaint in Civil Action No. H-86-3947 in which the Trustee and the Receiver sought unsuccessfully to set aside transfers of the subject property as voidable fraudulent conveyances under the bankruptcy code. Basically the same facts were presented and stipulated to by all parties to the Court in both matters. These stipulated facts present a highly irregular and curiously entangled series of land transactions involving the debtor and varoius related entities. As in Civil Action No. H-86-3947, the Court has adopted the stipulation presented by the parties and entered further Findings of Fact commencing with finding number 41. Based on the record of the trial of this cause, the Court holds that despite the wholesale indicia of fraud in order to preserve assets, the Defendant Moody is entitled to a homestead under Texas law, that such homestead is rural in character, but that it is limited pursuant to statute to one hundred acres.

Findings of Fact

1. To the extent that any of the Findings of Fact that follow are considered to be Conclusions of Law, they are hereby adopted as such.

2. Shearn Moody, Jr. Debtor (hereafter Debtor or Moody) is an unmarried adult. (Admission of Fact No. 1.).

3. At all times material hereto, Debtor was the sole shareholder of the Shearn Moody Holding Corporation ("SMHC"). Accordingly, all of the shares of stock of SMHC were property of Debtor's bankruptcy estate. (Admission of Fact No. 2.).

4. At all times material hereto, Debtor was also an officer and director of SMHC. (Admission of Fact No. 3.)

5. The approximately 575 acre tract of land located at 2601 Eight Mile Road in the City of Galveston, Galveston County, Texas, and depicted on Plaintiff's Exhibit 51A is referred to as the subject tract (T, 5/14/87, p. 31, l. 8-10)[1] The subject tract is generally described in Findings of Fact number 10 and 11.

6. Prior to the incorporation of SMHC, the Debtor acquired the subject tract in three, or possibly four, separate transactions. (Admission of Fact No. 4.). The Debtor acquired the bulk of the subject tract from Robert I. Cohen, Inc. by Deed dated and recorded May 6, 1960 (Plaintiff's Exhibit 1). This transaction was partly for cash and partly financed by Trust 42A for the Debtor's benefit. In May of 1972, when the Debtor became of age pursuant to the terms of Trust 42A, each of three trustees executed warranty deeds conveying the tract of land acquired from Robert I. Cohen, Inc. to the Debtor (Plaintiff's Exhibits 9, 10 and 11). The Debtor acquired another portion of the subject tract from B. Wittjen and Gaddis Wittjen by Deed dated July 21, 1967 (Plaintiff's Exhibit 7). The Debtor acquired another protion of the subject tract from B. Wittjen and Gaddis Wittjen by Deed dated July 21, 1967 (Plaintiff's Exhibit 7). The Debtor acquired another portion of

[1] "T" refers to Transcript "p." refers to page number "1." refers to line number

of the subject tract from National Western Life Insurance Company ("National Western") after the Debtor paid off an investment made by the Debtor and others upon the default of the other investors. This was accomplished by Deed dated December 29, 1969 (Exhibits 2,3,4,5 and 6). Finally, the Debtor acquired a portion of the subject tract from Robert I. Cohen's aunt, Mrs. Gladys Blum. Joe Max Taylor obtained the property from Mrs. Blum, and subsequently deeded it to the Debtor on April 24, 1970 (Plaintiff's Exhibit 8).

7. In 1972, the Debtor's privately chartered bank, W.L. Moody (Unincorporated) & Co. Bankers, was placed in receivership by the Securities and Exchange Commission. Members of the Debtor's family advanced funds necessary to pay off the depositors. To secure these advances, the Debtor gave a mortgage on the entire subject tract of land to these members of his family (Plaintiff's Exhibit 12). As the assets of the bank were liquidated, the monies advanced to pay off the depositors were repaid to these members of Debtor's family. (Admission of Fact No. 5.).

8. On January 5, 1973, SMHC was incorporated by the Debtor's brother, Robert L. Moody, acting pursuant to a Power of Attorney granted to him by the Debtor during the Debtor's illness. (Admission of Fact No. 6.).

9. Part of the capitalization of SMHC came from assets remaining after the dissolution of another one of Debtor's life insurance companies, Empire State Life Insurance Company (not to be confused with Empire Life, a distinct entity). The policies of insurance of Empire State Life Insurance Company were reinsured by a life insurance company belonging to Robert L. Moody, known as National Western. The remaining assets after dissolution were transferred to SMHC. Among the assets transferred were three-fifths (3/5ths) of one eighth (1/8th) life estate in-

terest in the Libby Shearn Moody Trust ("Trust 57"). (Admission of Fact No. 7.)

10. On August 1, 1973, there remained due and owing to the Debtor's family members the sum of Nine Hundred Twenty-Three Thousand, Seven Hundred Thirteen and 75/100 Dollars ($923,713.75). On that date, Debtor executed a promissory note made payable to National Western in that amount for a loan which was used to pay off the Debtor's family members (Plaintiff's Exhibit 47). To secure this transaction, the Debtor executed a deed of trust in favor of National Western (the "mortgage to National Western" or the "National Western Mortgage") on the following described approximately 565 acre portion of the subject tract (Plaintiff's Exhibit 17):

> TRACT NO. 1:
> Lots 5,6,7,8,9,10,11,12,13,14,15,16,25,26,27,28, 29,32,33,34,35,36,45 and 46 in Section No. 2, Trimble & Lindsey Survey, Galveston Island, Galveston County, Texas, and Lots 93, 437,446,447,454,455,456,457,466,467,468,469, 474,475,476,477,481,486,487,489,494,495,496 and 497 in Section No. 1, Trimble & Lindsey Survey, Galveston Island, Galveston County, Texas.

That portion of all unopened and previously dedicated County roadways which have heretofore, by appropriate action of the County Court of Galveston County, Texas, been abandoned, which lie between or which are contiguous to the lots in Section No. 1 and No. 2, Trimble & Lindsey Survey, Galveston Island, Galveston County, Texas.

> TRACT NO. 2:
> Lot 473 and the South 1515.13 feet of the West 230 feet of Lot 470, Section 1, Trimble & Lindsey Survey, Galveston Island, Galveston County, Texas.

TRACT NO. 3:

The East one-half (½) of Lot 389 and the North 493.9 feet of the West 245 feet of Lot 374, Section 1, Trimble & Lindsey Survey at Galveston Island, Galveston County, Texas.

TRACT NO. 4:

The surface only of Lots 114 and 115 in Section 2, Trimble & Lindsey Survey at Galveston Island, Galveston County, Texas. (Admission of Fact No. 8.).

11. The Debtor excepted from the mortgage of National Western a ten acre parcel of the subject tract, generally described as a tract of land located in Lots 36, 25, 16, and 5, in Section 2, and Lots 497, 496, 486 and 487 in Section 1 in the Trimble & Lindsey Survey of Galveston Island, Galveston County, Texas (the "ten acre tract"). (Admission of Fact No. 9.).

12. The loan from National Western was guaranteed by SMHC (Plaintiff's Exhibit 16). To further secure the loan from National Western, SMHC collaterally assigned a life insurance policy on the Debtor's life (Plaintiff's Exhibit 15) and a one-fifth (1/5th) of one-eighth (1/8th) life estate interest in Trust 57 (Plaintiff Exhibit 18). (Admission of Fact No. 10.).

13. Pursuant to agreements by and between National Western, SMHC, the Debtor and Moody National Bank as Trustee of Trust 57 (Plaintiff's Exhibits 14-19), the semiannual distribution attributable to this assigned life estate interest was forwarded directly to National Western. National Western would in turn pay the semiannual installment due on the loan, any premium due on the life insurance policy and all ad valorem taxes on the entire subject tract. The net proceeds remaining after such payments were remitted by National Western to SMHC and distributed to the Debtor in the form of dividends. (Admission of Fact No. 11.)

14. At all times material hereto, all payments on the mortgage to National Western and ad valorem taxes on the entire subject tract were paid in the manner set forth in Finding of Fact No. 13. (Admissions of Fact Nos. 12 and 41.).

15. Also in 1972, the Receiver and others filed a securities suit against the Debtor in the United States Court for the Northern District of Texas. At all times material hereto, this litigation was pending before the United States District Court for the Northern District of Texas, the Fifth Circuit Court of Appeals and/or the United States Supreme Court. (Admission of Fact No. 15.).

16. The Receiver obtained a multi-million dollar jury verdict on December 30, 1976, in the District Court in the Northern District of Texas. (Amission of Fact No. 14.).

17. Thereafter, on January 24, 1977, the Debtor conveyed the 565 acres of land described in the National Western Mortgage to SMHC by an Assumption Deed (the "1977 Assumption Deed") (Plaintiff's Exhibit 22). (Admission of Fact No. 15.).

18. Additionally, on September 7, 1977, the Debtor, in his capacity as President and sole shareholder of SMHC, mortgaged the entire subject tract to TEAC Finance Consortium in order to secure a six million dollar line of credit that was to be established (Plaintiff's Exhibits 23-27). Although no funds were extended under the line of credit, the mortgage has not been released, and Debtor never made demand upon TEAC to release the mortgage. (Admission of Fact No. 16.).

19. On January 4, 1979, the Debtor executed and recorded a Designation of Homestead covering 199.56

acres of the subject tract (the "first homestead designation") (Plaintiff's Exhibit 30). The first homestead designation included the one hundred acre tract hereinafter described in Finding of Fact No. 31. (Admission of Fact No. 18.).

20. On May 29, 1979, the Receiver obtained the entry of a judgment in the amount of $6,319,000.00 against the Debtor (Plaintiff's Exhibit 43.) (Admission of Fact No. 17.).

21. On June 27, 1979, the Debtor executed a Designation of Homestead covering one hundred acres of the subject tract, more or less, which was recorded on June 28, 1979 (the "second homestead designation") (Plaintiff's Exhibit 29). The second homestead designation included the ten acre tract. The second homestead designation states on its face that it was to be effective only if the first homestead designation was ineffective. (Admission of Fact No. 19.).

22. The Debtor filed various post-judgment motions in the Receiver's suit which were ultimately overruled on January 9, 1980. The Debtor then filed his notice of appeal of the Receiver's judgment on February 6, 1980. (Admission of Fact No. 20.).

23. Subsequent to the entry of the Receiver's Judgment, the Debtor made a number of transfers to one James A. Stoker. (Admission of Fact No. 21.).

24. The Debtor executed a Warranty Deed of Gift to Mr. Stoker consisting of an undivided one-half (½) interest in the ten acre tract (Plaintiff's Exhibit 36). The Warranty Deed of Gift states on its face that it was executed on October 10, 1979; however it was not recorded until January 25, 1980, 14 days after Debtor's post-judgment motions referenced above were overruled on January 9, 1980. (Admission of Fact No. 22.).

25. The Debtor executed an Agreement Creating Right of Survivorship in Joint Tenancy Property in favor of Mr. Stoker on October 10, 1979, with reference to the ten acre tract which was not recorded until January 25, 1980, 14 days after the post-judgment motions were overruled on January 9, 1980 (Plaintiff's Exhibit 31). (Admission of Fact No. 23.).

26. On April 1, 1980, the Debtor executed a Deed of Gift—Life Estate granting Mr. Stoker a life estate in the Debtor's remaining undivided one-half (½) interest in the ten acre tract which was recorded on August 11, 1980 (Plaintiff's Exhibit 37). (Admission of Fact No. 24.).

27. Both the October 10, 1980, Warranty Deed of Gift and the April 1, 1980 Deed of Gift—Life Estate were subject to conditions subsequent which had not occurred as of November 14, 1983. (Admission of Fact of No. 25.).

28. On April 1, 1980, James A. Stoker executed a Designation of Rural Homestead covering the ten acre tract which was recorded on August 11, 1980 (Plaintiff's Exhibit 34).

29. Also on April 1, 1980, the Debtor executed a Declaration of Trust conveying the ten acre tract into a trust (Plaintiff's Exhibit 33). The Trust was not to be effective unless James A. Stoker predeceased the Debtor. An instrument attempting to revoke the trust was executed by the Debtor on May 13, 1983 (Plaintiff's Exhibit 45). However, the revocation was not recorded until after the filing of the Debtor's initial Chapter 13 case in the Southern District of Texas. (Admission of Fact No. 27.).

30. Also, on April 1, 1980, the Debtor executed a Warranty Deed conveying to Shearn Moody, Jr., Trustee, all oil, gas, and other minerals, and mineral interests, and all royalty interests, which Debtor then owned in any land

situated in Galveston County, Texas (Plaintiff's Exhibit 32). (Admission of Fact No. 28.).

31. On March 18, 1982, the Debtor executed another assumption deed to SMHC (the "1982 Assumption Deed"), whereby the 565 acre tract previously conveyed by the 1977 Assumption Deed was again conveyed and/or reconveyed to SMHC, this time less one hundred acres, as opposed to the previous reservation of the ten acre tract. The one hundred acres that was reserved is the same property described in the second homestead designation. (Admission of Fact No. 29.).

32. On March 7, 1983, the Debtor, in his capacity as President and sole shareholder of SMHC, executed a Warranty Deed, conveying two hundred acres from SMHC to himself (the "1983 Warranty Deed"). The two hundred acres of the subject tract conveyed by SMHC to Debtor under the 1983 Warranty Deed included most, but not all, of the property described in the first homestead designation, some of which remained titled in SMHC. (Admission of Fact No. 30.).

33. On the dates of the execution and recordation of the 1982 Assumption Deed and the 1983 Warranty Deed, Debtor gave no consideration to SMHC in exchange for the transfers effected by the 1982 Assumption Deed and the 1983 Warranty Deed. (Admission of Fact No. 31.).

34. On March 25, 1983, the Debtor executed a Designation of Homestead (Plaintiff's Exhibit 42) covering the two hundred acres described in the 1983 Warranty Deed which was recorded on March 29, 1983, under Clerk's File Number 8310617 (the "third homestead designation"). (Admission of Fact No. 34.).

35. Thereafter, debtor executed another Warranty Deed (Plaintiff's Exhibit 41) conveying the two hundred acres described in the 1983 Warranty Deed to Shearn Moody, Jr., Trustee, which was recorded on March 29, 1983, under Clerk's File Number 8310618. (Admission of Fact No. 35.).

36. On April 1, 1983, Debtor executed another Warranty Deed (Plaintiff's Exhibit 43) conveying all oil, gas, or other minerals, or any mineral estate which he then owned, or might own in Galveston County, Texas to Shearn Moody, Jr., Trustee, which was recorded on April 11, 1983. (Admission of Fact No. 36.).

37. On May 13, 1983, the Debtor executed another Warranty Deed (Plaintiff's Exhibit 44) conveying all the minerals owned by the Debtor in, on, or under the two hundred acres described in the 1983 Warranty Deed to Shearn Moody, Jr., Trustee, which was recorded on June 28, 1983, after the Debtor's initial Chapter 13 filing in the Southern District of Texas. (Admission of Fact No. 37.).

38. On June 6, 1983, the Debtor filed his initial voluntary petition under Chpater 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas-Houston Division. (Admission of Fact No. 38.).

39. The Debtor dismissed his initial Chapter 13 case on November 10, 1983, and refiled another Chapter 13 case on November 14, 1983, in the United States Bankruptcy Court for the Middle District of North Carolina. It is this second Chapter 13 case which, after conversion to Chapter 11, change of venue and withdrawal of reference, currently pends before this Court as Civil Action No. H-86-2314. (Admission of Fact No. 39.).

40. Debtor's second Chapter 13 petition reflected that, on November 14, 1983, Debtor resided at 3525 Mayfair, Apt. 207, Durham. North Carolina 27707 (Plaintiff's Exhibit 49). (Admission of Fact No. 40.).

41. At the time of filing of the second Chapter 13 petition, the Debtor lived in an apartment at 3525 Mayfair, Durham, North Carolina. (T. 5/14/87)

42. Moody resided in North Carolina while undergoing extensive treatment for high blood pressure at the Kempner Clinic. (Moody's testimony, C.A. H-86-3947)

43. At the time of the filing of the second Chapter 13 petition, the Debtor was a resident of North Carolina or had a residence in the Middle District of North Carolina for a longer portion of the preceding 180 days than in any other district. (T. 5/14/87)

44. The Debtor temporarily resided at the Hotel Washington in 1986. (T. 5/19/87)

45. The Debtor spent intermittent periods of time at the Kempner Clinic at Duke University in Durham, North Carolina, from 1972 to the present. (T. 5/19/87)

46. The Debtor has also spent time at the premises of his mother located at 16 Cedar Lawn South, Galveston, Texas. (T. 5/19/87)

47. The Debtor has claimed neither the Washington Hotel nor the Cedar Lawn South premises as his principal home or domicile. (T. 5/19/87)

48. The Debtor claims the subject tract at 2601 Eight Mile Road as his domicile and homestead.

49. When the Debtor filed his second Chapter 13 petition in November 1983, the Debtor asserted that his "principal business" was dealing with his health problems which include high blood pressure. (T. 5/14/87)

50. Cattle are located on the subject tract and have been there since the 1800's. (T. 5/14/87)

51. The Debtor is entitled to favorable real estate tax treatment due to the presence of cattle. (T. 5/14/87)

52. The prior owners of the property had cattle on the land. (T. 5/14/87)

53. The property was originally known as the Kauffman Dairy Farm. (T. 5/14/87)

54. Much of Galveston Island historically has been used for cattle grazing and dairy farming. (T. 5/14/87)

55. The property owner directly to the south of the subject tract uses the land for cattle grazing and leasing horses. (T. 5/14/87)

56. The subject tract is located within the city limits of the City of Galveston, Texas, and was located within the city limits of the City of Galveston in November 1983. (T. 5/14/87)

[1] 57. The operative date for the purpose of determining whether the land is of rural or urban character is November 14, 1983, the date the debtor originally sought relief under the Bankruptcy Code in North Carolina. *In the Matter of Williamson*, 804 F.2d 1355 (5th Cir. 1986). (Debtor's eligibility for homestead exemptions determined as of date of original Chapter 11 filing, and not as of date bankruptcy case was converted to case under Chapter 7.).

58. The subject tract was annexed by the City of Galveston in 1977 as a result of land wars between the City of Hitchcock, the City of LaMarque, Texas City, and the City of Galveston. (T. 5/19/87)

59. The City of Galveston has twenty one zoning districts, none of which include agricultural districts regardless of the fact that much of the land west of the subject tract is undeveloped grazing land.

60. Prior to the time that the Debtor purchased the subject tract, the owner plotted it for single dwelling homes. (T. 5/14/87)

61. No commercial or residential development has taken place on the subject tract since the debtor acquired it.

62. Of the lots in the subject tract, approximately seven lots are zoned "PD," planned development. A planed development district is one in which the owner or developer can submit a plan to the Galveston City Zoning Board for approval. A "PD" district is a generalized designation, the purpose of which is to leave the designation open. (T. 5/15/87)

63. With the exception of Jamaica Beach and several minor designated areas, the City of Galveston runs twenty-five miles west of the subject tract on Eight Mile Road. (T. 5/15/87)

64. The land to the west of Eight Mile Road is primarily uninhabited and undeveloped, although there is some light industry development on Stewart Road. (T. 5/15/87)

65. The entire area within the city limits of Galveston is covered by one of the twenty one zoning districts. (T. 5/15/87)

66. Horses and cattle were observed by the Trustee's expert on the westerly portion of Galveston Island. (T. 5/15/87)

67. Neither gas lines nor sewer lines run directly to the subject tract. (T. 5/15/87)

68. A body of water known as Sweetwater Lake divides the subject tract, essentially forming a natural barrier on Galveston Island.

69. Accordingly to the Debtor, the population of Galveston Island historically has been located behind the seawall. (T. 5/19/87)

70. The subject tract is not located behind the seawall, and the last extension of the seawall was in the 1950's. (T. 5/19/87, Defendant's Exhibit 4)

71. Part of the subject tract is zoned "NS," neighborhood services. Eight lots are zoned "1F3," a single family residence category which includes townhomes. The bulk of the subject tract is zoned "1F1," for single family townhomes. (T. 5/20/87)

72. The neighborhood surrounding the subject tract has multi-purpose zoning, including multi-family, retail, and light industry use. However, the zoning designations do not conform to the actual use of the property.

73. There are only three residences located on the easterly side of Eight Mile Road, the Elbert House at the

northeast corner of Eight Mile Road and Stewart Road, the Moody home and the Bettencourt residence on the subject tract. (T. 5/15/87)

74. The Elbert home is listed on the 1986 tax rolls as located at Route 3, Box 80, Galveston, a rural address. (Defendant's Exhibit 11)

75. The 1986 tax roll indicates that the Elbert property is designated as unimproved grazing land for tax purposes. (Defendant's Exhibit 11)

76. The subject tract is also listed as unimproved grazing land and open space for tax purposes on the 1986 tax roll. (Defendant's Exhibit 11)

77. The physicial characteristics of the subject land have remained essentially the sames since November 14, 1983, the operative date for determination of Moody's entitlement to a homestead exemption. Therefore, the 1986 tax roll is probative evidence of the character of the subject tract and surrounding area in 1983.

78. For the tax years 1975-1983, the Debtor's federal income tax returns demonstrated that ranching operations on the subject tract resulted in large financial losses, thereby enabling the debtor to benefit from favorable tax treatment. (T. 5/15/87)

79. The lack of profitability of ranch operations conducted on the land clearly does not alter the physical character of the land.

80. Water from the City of Galveston is available on the subject tract. (T. 5/14/87)

81. A sewer line approximately 18 to 27 inches wide runs along Stewart Road. Although the existence of the sewer line infers future construction of higher density residences or businesses, the sewer line was not constructed on November 14, 1983.

82. Fire and police protection were available to the subject tract in November, 1983.

83. Midrise condominiums are located on the beach beyond the end of the seawall, south of Highway 3005. (T. 5/15/87, Defendant's Exhibit 4)

84. The Campeche Bay subdivision is located to the southeast of Sweetwater Lake. The subdivision was in existence in November, 1983.

85. Townhomes are located to the north of Stewart Road and to the east of Sweetwater Lake and were constructed some time during 1982 or 1983. (T. 5/15/87)

86. On the south side of Stewart Road, there is a multi-story apartment complex which was in existence in November, 1983. (T. 5/15/87)

87. At the northern end of Eight Mile Road are recreational type single family residences. (T. 5/26/87)

88. Between 1981 and 1984, a major construction boom took place on Galveston Island, primarily west of Six Mile Road, between Six and Seven Mile Road. (T. 5/15/87)

89. The area of Eight Mile Road between Stewart Road and FM 3005 contains single family residential buildings. (T. 5/15/87)

90. The houses referred to in Finding of Fact 89 are recreational beach homes built on supports or stilts. (T. 5/19/87)

91. The traffic count on Seawall Boulevard also known as FM 3005 which runs along the southerly side of Galveston Island south of the subject tract averaged over 5000 cars per day in 1983.

92. Stewart Road which gives access to the subject tract is a country road without curbs and sidewalks. (T. 5/15/87)

93. Although FM 3005 may have a traffic count comparable to many streets in the City of Houston, the geographic makeup of Galveston Island demonstrates that FM 3005 is basically a highway leading to beach and recreational areas, including a bridge approximately thirty miles west of the subject tract.

94. Traffic on Eight Mile Road in front of the subject tract is extremely light.

95. Neither of the two experts who testified as to the character of the subject tract was particularly helpful. Mr. Hewitt was generally unable to credibily support his assertions and had not thoroughly examined the area in question. Mr. Vidrine who testified as a friend on behalf of the Debtor had a degree is soil chemistry and had been employed as a teacher of agriculture, as a geophysicist, and as an exploration manager. He is currently an oil and gas consultant.

96. Although Vidrine had only been on the subject tract for the first time in 1984, he was generally familiar with the topography of Galveston Island.

97. The subject tract is comprised of a series of highlands and lowlands which form finger-like ridges. (T. 5/15/87)

98. The lowlands on the subject tract are included in a survey of wetlands by the Department of the Interior. (T. 5/15/87, Defendant's Exhibits 6,7,and 8)

99. A great part of the subject tract is wetland and extremely difficult to develop for commercial or residential use. (T. 5/15/87)

100. FM 3005 was constructed approximately seven or eight years ago and has double lanes. (T. 5/15/87)

101. Prior to the construction of FM 3005, Stewart Road and a road constructed of shell provided access to the western portion of Galveston Island. (T. 5/15/87)

102. The area north of Sweetwater Lake on the subject tract is inhabited by water moccasins, nutrea and other life forms and is extremely difficult to develop for land use. (T. 5/15/87)

103. There have been no major improvements on Stewart Road since Moody purchased the subject tract in 1961. No homes have been built along Stewart Road since his purchase, nor is the road well maintained.

104. The land to the west of Sweetwater Lake is substantially the same as the land on the subject tract, encompassing wide open spaces and pasture land. It is primarily wetland, which is suitable for grazing. (T. 5/19/87)

105. To the east of Seven Mile Road there is a con-

siderable amount of development including subdivisions and an airport. (T. 5/19/87)

106. In the area to the west of Sweetwater Lake there is a little residential development.

107. In 1983, commercial development on Galveston Island was taking place to the east of the subject tract.

108. By November 14, 1983, the subject tract still retained a rural character.

109. As of November 14, 1983, the subject tract is properly characterized as undeveloped rural land.

110. When Moody moved into the home on the subject tract in 1965, he intended to make the property his homestead. (T. 5/19/87)

111. Since 1965 Moody has claimed no other property as his Texas homestead. (T. 5/19/87)

112. Although Moody temporarily resided at the Hotel Washington, his mother's residence and an apartment in North Carolina, he had no intention of abandoning his homestead rights in the subject tract. (T. 5/19/87)

113. Goats, horses and cattle are located on the subject tract. (T. 5/19/87)

114. When Moody conveyed and attempted to reconvey certain acreage to the Shearn Moody Holding Company (SMHC) in 1977 and 1982, he intended to retain his homestead rights in the subject land.

115. Moody remained in possession of the subject tract in 1983, although SMHC is listed on the 1986 tax rolls as holding title to the portion which Moody attempted to designate as his homestead. (T. 5/19/87, Defendant's Exhibit 11)

116. The home and its adjoining tracts have consistently been used for homestead purposes since 1965.

117. Any purported conveyances to SMHC are void, without consideration and ineffective to demonstrate alienation of Moody's homestead rights in the subject tract.

118. Irrespective of any fraudulent intent Moody may have had, the conveyances of property designated as homestead to SMHC are not fraudulent as to Moody's creditors and are therefore ineffective transfers of homestead property.

119. At no time did Moody relinquish or abandon his homestead rights in the subject tract.

120. Similarly, the conveyances of ten acres of property to Stoker are void, ineffective and without consideration.

121. The Stoker deeds are attempts by Moody to shield the land from creditors and to maintain at the same time his homestead interest in the land.

122. The deeds to Stoker recited that they were subject to conditions subsequent that had not occurred on November 14, 1983. Therefore, any purported conveyance of title to property on which Moody could claim homestead rights was void and ineffective.

123. At no time did Stoker ever attempt to assert that Moody no longer had the homestead right to reside in the residence on the subject tract.

124. The conveyances to SMHC and Stoker are not pretended sales. No evidence was presented that Moody attempted to mortgage or encumber property for the purpose of obtaining money, thereby rendering the conveyances pretended sales.

125. Although the above conveyances are not pretended sales, they are void, ineffective, convey no homestead rights, and may not be deemed to be in fraud of creditors under Texas law.

126. The purported transfer of homestead property to Shearn Moody, Jr., Trustee, is also a void attempt to transfer homestead property into a trust for the purpose of protecting the land from execution by creditors.

127. Because Moody has neither alienated nor abandoned his homestead rights, he is entitled to claim one hundred acres of land as his rural homestead under existing Texas law. The second homestead designation is therefore the operative instrument establishing Moody's exemption.

CONCLUSIONS OF LAW

THE TEXAS HOMESTEAD EXEMPTION

1. The Texas homestead exemption has historically commanded unusual deference. Protection of homestead rights has consistently been a fundamental policy of Texas law. *Commonwealth National Bank v. United States*, 583 F.Supp. 881 (N.D.Tex. 1983).

2. The respect afforded a Texas homestead is so great that under Texas law, the homestead right constitutes an estate in land rather than a mere priviledge of exemption or possession. *Andrews v. Security Nat. Bank of Wichita Falls,* 121 Tex. 409, 50 S.W.2d 253 (1932), *Sakowitz Bros. v. McCord,* 162 S.W.2d 437 (Tex.Civ.App—Galveston, 1942, no writ).

3. Pursuant to the bankruptcy Code, Title 11 U.S.C. § 522b(2)(A) provides in part that a debtor may exempt from property of the bankruptcy estate property exempt under state or local law that is applicable on the date of filing of the petition at the place in which the Debtor's domicile has been located for the 180 days immediately preceding the date of the filing. Although Moody filed his Chapter 13 petition in North Carolina, he was only residing temporarily in North Carolina. At all times material Moody was a Texas domiciliary and was entitled to invoke Texas' exemption statutes. *In re Bubert,* 61 B.R. 362 (W.D.Tex. 1986), affirmed, 809 F.2d 259 (5th Cir. 1987)(Debtor may claim "exemptions" under federal statutory scheme or choose "exemptions" as they are granted by the laws of the Debtor's home state): *In re Wellerg,* 12 B.R. 48 (Bankr.E.D.Va. 1981)(Definition of domicile for the purpose of determining exemptions is determined by law of forum).

[2] 4. Bankruptcy courts must resort to state law for an interpretation of state exemption rights in homesteads. *In re Barnhart* 47 B.R. 277 (Bankr.N.D.Tex. 1985). Under Texas law land claimed as homestead is exempt from execution by judgment creditors, and a debtor may convey homestead property free and clear of judgment liens. *Englander v. Kennedy,* 424 S.W.2d 305 (Tex.Civ.App.—

Dallas 1968, writ ref'd n.r.e.).[2]

5. Article XVI, Section 51 of the Texas Constitution provides that:

> The homestead not in a town or city, shall consist of not more than 200 acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village shall consist of a lot or lots amounting to no more than one acre of land, together with any improvements on the land; provided that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

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[2] The homestead rights of Texas citizens are guaranteed by the Texas Constitution, Art. 16 § 50 which provides:

The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lein on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinafter provided, whether such mortgage, or trust deed, or other lein, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void. This amendment shall become effective upon its adoption.

The Texas Property Code further clarifies the definition of a Texas Homestead. Section 41.002 provides:

> (a) If used for the purpose of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than one acre of land which may be in one or more lots, together with any improvements thereon.
>
> (b) If used for the purposes of a rural home, the homestead shall consist of:
>
> (1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or
>
> (2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.
>
> (c) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created.

6. Ordinarily, whether homestead land had rural or urban character is a question of fact unless the facts and circumstances are such that reasonable minds cannot differ. *Aetna Ins. Co. v. Ford*, 417 S.W.2d 448 (Tex.Civ.App.—Eastland 1967), rev'd. on other grounds, 424 S.W.2d 612 (Tex. 1968), *First State Bank of Grapeland v. Brown*, 490 S.W.2d 248 (Tex.Civ.App.—Tyler 1973, no writ); *Kimmey v. Goodrum*, 346 S.W.2d 901 (Tex.Civ.App.—Waco 1961, writ ref. n.r.e.).

7. In order to establish homestead rights, the proof must show a combination of both overt acts of homestead usage and the intention on the part of the owner to claim the land as homestead. *Sims v. Beeson* 545 S.W.2d 262, 263 (Tex.Civ.App.—Tyler 1976, writ ref'd n.r.e.); *Prince v. North State Bank*, 484 S.W.2d 405, 409 (Tex.Civ.App.—Amarillo 1972, writ ref'd n.r.e.).

8. Actual use of land as a homestead is the most satisfactory and convincing evidence of intention to put land to homestead use. *Lifemark Corp. v. Merritt*, 655 S.W.2d 310 (Tex.App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); *Spence v. Spence*, 455 S.W.2d 365, 368 (Tex.Civ.App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); *Clark v. Salinas*, 626 S.W.2d 118 (Tex.Civ.App.—Corpus Christi 1981), writ ref'd n.r.e. 628 S.W.2d 51 (Tex. 1982).

9. Ordinarily, the initial burdon of proving the existence of a homestead is on the homestead claimant. *Burk Royalty Co. v. Riley*, 475 S.W.2d 566 (Tex. 1972); *Pace v. McEwen*, 617 S.W.2d 816 (Tex.Civ. App.—Houston [14th Dist.] 1981, no writ). Once the claimant of homestead protection has established his homestead, the burden shifts to the creditor seeking turnover of the homestead in satisfaction of a judgment to disprove its continued existence. *Lifemark v. Merritt*, supra at 314.

10. The burden amounts to a presumption that the homestead continues to exist until its termination is proved. *Sullivan v. Barnett*, 471 S.W.2d, 39, 43 (Tex. 1971).

11. In Texas homestead rights may only be lost through death, abandonment or alienation. *Long Bell Lumber Co. v. Miller*, 240 S.W.2d 405 (Tex.Civ.App.—Amarillo 1951, no writ); *Hollifield v. Hilton*, 515 S.W.2d 717 (Tex.Civ.App.—Ft. Worth 1974, writ ref'd n.r.e.).

12. The burden of proving abandonment is on the party asserting that the homestead rights have been abandoned. *Sullivan v. Barnett*, supra at 43; *Rancho Oil Co. v. Powell*, 142 Tex. 63, 175 S.W.2d 960 (1943). *Gill v. Quinn*, 613 S.W.2d 324 (Tex.Civ.App.—Eastland 1981, no writ).

13. The evidence relied on to establish abandonment of a homestead must make it undeniably clear that there has been a total abandonment with an intention not to return and claim the exemption. *Burkhardt v. Lieberman*, 138 Tex, 409, 159 S.W.2d 847, 852 (1942); *West v. Austin Nat'l Bank*, 427 S.W.2d 906 (Tex.Civ.App.—San Antonio 1968, writ ref'd n.r.e.). Mere removal of an owner from the homestead does not show abandonment; abandonment requires both an overt act of discontinued use and the intent to permanently do so. *Gill v. Quinn*, 613 S.W.2d [324 (Tex.Civ.App.— Eastland 1981, no writ); *Hoffman v. Love*, 494 S.W.2d 591 (Tex.Civ.App.—Dallas), writ ref'd n.r.e. per curiam, 499 S.W.2d 295 (Tex. 1973). A temporary departure from the homestead does not constitute abandonment. *McFarland v. Rousseau*, 667 S.W.2d 929, 931 (Tex.App.—1984, no writ).

14. Whether there has been an abandonment of a homestead is generally a question of fact. *R.B. Spencer & Co. v. Green*, 203 S.W.2d 957 (Tex.Civ.App.—El Paso 1947, no writ).

[3] 15. The Plaintiff's assert that Moody's actions on several occasions amount to abandonment of Moody's homestead rights. The Trustee and Empire have failed to produce sufficient evidence demonstrating that Moody's sojourns in North Carolina and Washington D.C. constituted complete and total abandonment by Moody with no intention to return to the subject tract. Moody's absence was primarily for health reasons and cannot be considered

complete and total abandonment of Moody's homestead rights. *R.B. Spencer & Co. v. Green*, 203 S.W.2d (Tex.Civ.App.—El Paso 1947, no writ).

[4] 16. Moody alleges that he is entitled to claim two hundred acres of land located on the subject tract as his rural homestead. The Trustee argues that the land was located within the city limits of Galveston in 1983 and had a predominantly urban character at the time Moody filed his bankruptcy petition, therefore entitling him to one acre of land at most.

17. Under Texas law, no set formula exists to label land as rural or urban. The courts have examined and balanced many factors. Although location of a homestead is a factor, it is not determinative of whether the character of the land is rural or urban. Where a rural homestead right exists in lands adjacent to a town or city, an extension of the corporate lines of the city or town around the land will not destroy the character of the rural homestead. *Laucheimer v. Saunders*, 97 Tex. 137, 76 S.W. 750 (1903); *Wilder v. McConnell*, 91 Tex. 600, 45 S.W. 145 (1898). A rural homestead may be situated entirely or partially within the corporate limits of a city, town or village, and an urban homestead may be located outside of the corporate limits. *Aetna Ins. Co. v. Ford*, 417 S.W. 448, (Tex.Civ.App.—Eastland 1967) rev'd on other grounds, 424 S.W.2d 612 (Tex. 1968).

18. The platting of land does not necessarily change the character of homestead from rural to urban where land is platted after it is included within city limits. *Atkinson v. Phares*, 20 Tex.Civ.App. 150, 49 S.W. 653 (1898, writ denied).

19. Where a homestead is designated as rural before

a city's lines are extended beyond it, the rural character is presumed to continue until sufficient evidence is presented to demonstrate that acts had been done by the owner or by the city to change its character from rural to an urban homestead. *Wilder v. McConnell*, supra 45 S.W.2d at 147.

20. The character of the land in close proximity to the claimed homestead as well as the occupations of those living in the surrounding areas are probative of a tract's rural or urban characteristics. See e.g. *Commerce Farm Credit Co. v. Sales*, 288 S.W. 802 (Tex.Comm'n App. 1926, holding approved).

21. The use of city services such as fire and water is also probative of the land's character. See e.g. *Commerce Farm Credit Co. v. Sales*, supra at 804.

22. An urban area generally consists of an aggregation of inhabitants and a collection of dwellings and other buildings. *Purdy v. Grove*, 35 S.W.2d 1078 (Tex.Civ.App.—Eastland 1931, writ ref'd); *Vistron Corp. v. Winstead*, 521 S.W.2d 754 (Tex.Civ.App.—Eastland 1975, no writ).

23. To constitute a rural homestead, the land must be used for a residence and the balance of the tract for the support of the family. *Ratliff v. Smith*, 178 S.W.2d 138, 140 (Tex.Civ.App.—El Paso 1943, writ ref'd); *Vaden v. Collier*, 253 S.W. 889 (Tex.Civ.App.—Fort Worth 1923, no writ) (Rural homestead may be located in separate tracts of land provided one tract is used as a place of residence for a family and the other tracts are used for the purpose of supporting the family).

24. Although the Trustee argues that the subject tract was not used for rural purposes at the time the Debt-

or filed his second Chapter 13 petition, the testimony is effectively uncontroverted that a substantial number of cattle were grazing on the land, thereby supporting the Debtor's assertions that the land was used for rural activities. Because the Debtor's financial station in life may not have rendered it necessary for him to derive sole financial support from the land, this fact alone does not convert rural property to urban land. As the Texas Supreme Court noted in *Posey v. Bass*, 77 Tex. 512, 14 S.W. 156 (1890):

> It is the place of the homestead that gives character to it, not the business of the head of the family. If it be in the country it is a rural homestead; if it be in a city it is an urban residence.

25. Moody has successfully demonstrated that the subject tract was rural property when he purchased the land with the intent to designate the tract as his homestead in the 1960's. Once the presumption that a rural homestead is established, that persumption continues until rebutted by competent evidence. The Trustee and Intervenor have failed to produce sufficient evidence to demonstrate that on November 14, 1983, the city or Moody as the owner, had taken steps to change the character of the land from rural to urban.

[5] 26. Moody, however, is only entitled to claim one hundred acres of his rural homestead exemption. Moody cites Jacobus; *Texas Real Estate Law* (4th Ed. 1985) for the proposition that section 41.002 of the Texas Property Code which limits a single person claiming a rural homestead to one hundred acres is an impermissible modification of the Texas Constitution on the basis that later legislation may not restrict or modify the state's constitution. The Court notes, however, that similar exemption statutes distinguishing between single and married

people have withstood constitutional muster. *In re Stratham*, 483 F.2d 436 (9th Cir) cert. denied, 414 U.S. 1069, 94 S.Ct. 578, 38 L.Ed.2d 474 (1973) (State of Washington's homestead exemptions distinguishing between married and single people did not violate the equal protection clause of the 14th Amendment).

Additionally, well established principles of judicial restraint militate against federal court intervention in state legislation absent evidence of violations that reach constitutional magnitude. Accordingly, the Court declines the invitation to strike down the challenged provision in the Texas Property Code.

27. The Court concludes that on the operative date, November 14, 1983, the subject tract was rural land for the purpose of the Texas constitutional homestead exemption, thereby entitling Moody as a single person to claim one hundred acres.

a.

THE SMHC CONVEYANCES

[6] 28. The Trustee and Intervenor attack certain conveyances involving Shearn Moody Holding Company, claiming that Moody extinguished his homestead rights by conveying title to portions of the subject tract to the corporation of which he was President and sole shareholder.

As set forth in the findings of fact, Moody conveyed 565 acres of land described in the National Western Mortgage to SMHC by an assumption deed (the "1977 Assumption Deed"). In March 1982, Moody executed another assumption deed to SMHC whereby the 565-acre tract previously conveyed was "re-conveyed" less one hundred acres described in the second homestead designation.

In 1983, as sole shareholder, and President of SMHC, Moody conveyed by warranty deed two hundred acres back to himself, which included most of the property included in the first homestead designation. The parties stipulated that no consideration was given for the transfer effected by the 1982 Assumption Deed and the 1983 Warranty Deed.

The consideration recited for the 1977 Assumption Deed to SMHC was cancellation of all debts owed by Moody to SMHC and the payment by SMHC of all amounts remaining due on the promissory note executed to National Western Life Insurance Company in 1973. However, the stipulated facts reveal that SMHC had previously collateralized and guaranteed the National Western Mortgage on August 1, 1973. The Court's finding is in accordance with Judge Clark's finding that the conveyances were without any business or rational purpose, and was done to hide assets from the Receiver.

The Court also concludes that the 1977 Assumption Deed to SMHC was done without consideration and for no valid business purpose. Moody's purpose in executing the 1977 deed to SMHC was to hide assets from his creditors. Moody's attempt to convey homestead property to SMHC was not bonafide because his actions and intentions demonstrate that he intended to maintain a homestead interest in the land. Therefore, the deed is void and cannot be used as a basis to deprive Moody of his homestead rights. Moody at all times intended to claim the subject tract as his homestead and remained in control and possession of the subject tract throughout the paper transactions.

29. The Trustee and Intervenor propound several theories based on corporate ownership of the subject tract to demonstrate abandonment and alienation of the homestead. The Trustee relies on *In re Yamin*, 65 B.R. 938

(Bankr.S.D.Tex. 1986) to support his contention that by merely occupying the ranch premises while legal title to the property was held by SMHC, Moody effectively abandoned his homestead interest in the subject tract. A close reading of *Yamin* does not support this conclusion. The bankruptcy court in *Yamin* concluded that where title to residential property was held by a corporation to prevent and defraud personal creditors from obtaining liens against a residence, the debtor had no intent to claim the property as homestead. 65 B.R. at 942.

However, in *Yamin*, the debtor explicitly denied claiming the property as homestead while a mortgagee relied on his representations that the property was not homestead and took a lien on the property. The bankruptcy court held that Yamin had abandoned his homestead rights by executing a deed of trust on the property to the corporation which explicitly denied the debtor any homestead interest in the residence. The Court did give weight to the fact that the debtor misrepresented the character of the property to the detriment of the mortgagee, thereby estopping and precluding the debtor from asserting a homestead interest in the mortgaged property. 65 Bankr. at 942.

30. The Court is not persuaded that holding title to property in a corporate name alone extinguishes homestead rights by abandonment. The cases cited for this proposition in *Yamin* explicitly deal with bona fide transfers of business homesteads to corporations, accompanied by intent to relinquish homestead rights, a situation clearly not present in this case and of questionable relevance to the facts in *Yamin*. See, e.g. Eckard v. Citizens Nat. Bank in Abilene, 588 S.W.2d 861 (Tex.Civ.App.—Eastland 1979 writ ref'd n.r.e.); *Nowlin v. Wm. Cameron & Co.*, 54 S.W.2d 1035 (Tex.Civ.App.—Fort Worth 1932, writ refused); *Nash v. Conatser*, 410 S.W.2d 512

(Tex.Civ.App.—Dallas 1966, no writ); and *Mayfield v. First State Bank of Holland,* 19 S.W.2d 454 (Tex.Civ.App.—Austin 1929, no writ).

31. Texas law clearly permits the retention of a non-business homestead where title is held by a corporation. See e.g., *McGahey v. Ford,* 563 S.W.2d 857 (Tex.Civ.App.—Fort Worth 1978, writ ref'd n.r.e.); *Shepler v. Kubena,* 563 S.W.2d 382 (Tex.Civ.App.—Austin 1978, no writ). In addition, Texas law liberally permits homestead rights to exist under a tenancy at will, see *Shepler,* supra, and under permissive occupancy. *Birdwell v. Burleson,* 31 Tex.Civ.App. 31, 72 S.W. 446 (1902, writ ref'd).

32. Homestead rights may be asserted by a debtor where a conveyance of homestead property is neither bona fide nor marked by an intent to relinquish or abandon the homestead. See e.g. *Hughes v. Parmer,* 164 S.W.2d 576 (Tex.Civ.App.—Austin 1942, no writ).

33. The Trustee argues that a conveyance of realty in fraud of creditors actually passes title to the realty, thereby rendering the property subject to the debts of SMHC. See e.g. *Ransom v. Ransom,* 252 S.W.2d 212 (Tex.Civ.App.—Fort Worth 1952, writ ref'd); *Letcher v. Letcher,* 421 S.W.2d 162 (Tex.Civ.App.—San Antonio 1967, writ dismissed); *John Hancock Mutual Life Ins. Co. v. Morse,* 132 Tex. 534, 124 S.W.2d 330 (Tex.Comm.App. 1939). However, the Court has already determined in C.A. H-86-3947, 77 B.R. 566, that under Texas law, a bankruptcy trustee and a judgment creditor may not set aside a conveyance of exempt homestead property where the purpose is to place assets beyond the creditor's reach. The practice is not fraudulent as to creditors. As the Fifth Circuit observed citing earlier Texas jurisprudence, Texas

constitutional and statutory protection of the homestead is absolute and will be allowed in full regardless of a debtor's intent. *Matter of Reed*, 700 F.2d 986 (5th Cir. 1983).

34. The Trustee argues that Moody may not set aside his own fraudulent conveyances. However, because the conveyances of homestead property are not fraudulent as to creditors, the Trustee's standing argument is inapplicable to Moody's situation.

35. Moody argues that the conveyances to SMHC are "pretended sales" under the Texas constitution and are therefore void. A pretended sale, however, involves a conveyance where a mortgage is actually placed on the homestead that would otherwise be invalid under the Texas constitution. A pretended sale is one in which the grantor intends the transaction to be a mortgage, security for a debt owing by the transferor to the transferee. *Hardie & Co. v. Campbell*, 63 Tex. 292 (1885). The existence of a debtor/creditor relationship after the execution of the deed is determinative of whether the conveyance is a mortgage. *Mansfield v. Orange Investment Co.*, 260 S.W. 307 (Tex.Civ.App.—Beaumont 1924, no writ).

36. Moody has failed to demonstrate the existence of a debtor/creditor relationship that brings the conveyances to SMHC within the definition of a pretended sale. However, because the deed to SMHC has already been deemed void, and without any intent to relinquish homestead rights, no title was passed to SMHC by the conveyance. See e.g. *Sullivan v. Barnett*, 471 S.W.2d 39 (Tex. 1971) (Ineffective deed to real estate did not constitute abandonment of homestead rights where grantor remained on land and continued to use it as a homestead); *Hughes v. Parmer*, 164 S.W.2d 576 (Tex.Civ.App.—Austin 1942, no writ) (Deed of homestead property was void where there

was no intent to pass title and grantor remained in possession of property. Conveyance was not fraudulent as to creditors).

37. Having concluded that the 1977 deed, the 1982 Assumption Deed and the 1983 warranty deed were void attempts to convey homestead property, the Court finds that title to the property remained in Moody. Therefore, Moody may claim a one hundred acre rural homestead pursuant to Texas law.

b.

THE STOKER CONVEYANCES

38. The Trustee asserts that the deeds to James Stoker conveyed away any homestead rights Moody had in the land. The evidence revealed that in 1979 and 1980 Moody deeded to Stoker his long time friend and companion an undivided half interest in a ten acre tract, a right of survivorship in the ten acre tract and a life estate in the remaining undivided half of the ten acre tract. This tract was not included in the mortgage to National Western or the 1977 conveyance to SMHC. Moody, however, did include the ten acre tract in the first two homestead designations which were executed and recorded.

39. The deed of gift life estate and warranty deed contained conditions subsequent that the parties stipulated had not occurred as of November 14, 1983; specifically, that Stoker would maintain the property as his permanent home and that he would not transfer his interest or the conveyances would not be effective. The purported consideration for the conveyances was love and affection.

40. The transfers to Stoker are clearly a sham and a

nullity. Stoker testified that Moody always had the right to use the ranch house as his home. Moody retained the right to remain on the rance. For all practical purposes, no changes occurred whatsoever as a result of the transfer. The Court concludes that the transfers to Stoker were a misguided attempt to convey homestead property in order to protect it from Moody's creditors and to permit Moody to retain a homestead. They are therefore ineffective to eliminate Moody's homestead rights in the land.

[7] 41. Even assuming that the Stoker deeds are valid conveyances of real property, title to land in fee simple is not required to sustain a claim of homestead. *Villarreal v. Laredo National Bank*, 677 S.W.2d 600 (Tex.App.—San Antonio 1984 no writ); *Gann v. Montgomery*, 210 S.W.2d 255 (Tex.Civ.App.—Fort Worth 1948, writ ref'd. n.r.e.).

42. Under Texas law, a debtor need not have an assignable interest in land to claim a homestead. *Birdwell v. Burleson*, 31 Tex.Civ.App. 31, 72 S.W. 446 (1902, writ refused.) (Possession and use of property enough to sustain rural homestead rights); *Lewis v. Lindsley*, 68 S.W.2d 548 Tex.Civ. App.—Austin 1934, writ refused) (Where owner of land permitted his brother and family to remain and improve land, homestead rights were acquired by occupant.) Although Texas cases focusing on the homestead are not consistent, those dealing generally with homestead rights among close family members support the proposition that homestead rights may exist in the absence of legal title to land.

43. The Trustee asserts that Moody retained a reversionary interest in the ten acre tract that will not sustain a homestead. A remainder interest or a reversionary interest will not ordinarily sustain a claim of homestead. See *Rettig v. Houston West End Realty Co.*, 254 S.W. 765 (Tex.

Comm'n App.1923, Judg'mt adopted); *Turner v. Miller*, 255 S.W. 237 (Tex.Civ App.—Amarillo, 1923, no writ). However, on the date Moody's entitlement to a homestead is to be determined, November 14, 1983 the conditions subsequent in the Stoker deed of gift life estate and warranty deed of gift had not yet occurred. Even though the agreement creating right of survivorship in joint tenancy property did not contain explicit conditions it was also premised on the conditions listed in the two deeds. Even assuming the validity, of the deeds, Moody retained more than a reversion while remaining in possession of the land. Moody still had sufficient interest in the land to sustain a homestead exemption.

44. The debtor also argues that the deeds to Stoker were "pretended sales." As the Court noted previously, as to the SMHC conveyances, determination of whether a conveyance constitutes a pretended sale is a question of fact. The debtor produced no evidence whatsoever that the Stoker transaction was based on a debtor/creditor relationship or that the purpose of the deeds was to encumber the ten acre tract with a lien or mortgage. Therefore the conveyances were not pretended sales; rather they were nullities which conveyed no interest in the property.

47. The Court finds that the Stoker transactions did not extinguish Moody's homestead rights.

Conclusion

The analysis employed to reach the conclusion that Moody is entitled to claim a Texas homestead is arduous and fraught with legal minefields, some of which constitute issues of first impression. However, when the layers of deception are peeled away, one conclusion emerges. Despite the flurry of perplexing real estate deeds, Moody intended

to maintain a Texas homestead at all times. The conveyances of homestead property were motivated by the misguided purpose of protecting Moody's home from a judgment creditor, a protection already engraved in stone by Texas jurisprudence. While the result may appear inequitable and arcane, Texas courts for well over a century have jealously protected the homestead rights of Texas citizens, notwithstanding the fact that by doing so, a dishonest debtor may be assisted in the process in concealing assets from his creditors.

> As one jurist has aptly stated:
> "Saints and sinners have equal constitutional rights to a homestead. The exemption law shields the home of a debtor's family from the claims of his creditors, regardless of his station in life or society."
> *Garrard v. Henderson*, 209 S.W.2d 225 (Tex.Civ.App.—Dallas 1948, no writ). (Chief Justice Bond)

The court is duty bound to apply Texas law. Accordingly, Moody is entitled to enjoy the benefit of the Texas homestead exemption.

In re Shearn MOODY, Jr., Debtor.

W. Steve SMITH, Trustee, Plaintiff,

v.

Shearn MOODY, Jr., Debtor,
Defendant.

Civ. A. No. H-86-3947.

United States District Court,
S.D. Texas,
Houston Division.

Aug. 11, 1987.

Chapter 13 trustee sought to set aside, as fraudulent conveyance, transfer of property designated by debtor as his homestead. The District Court, Carl O. Bue, Jr., J., held that under Texas law, Chapter 13 trustee could not enforce equitable lien on debtor's claimed homestead property in spite of fact that debtor's machinations in selling and then reacquiring property may have been prompted by desire to remove his assets from execution by creditors.

Relief denied.

See also, D.C., 77 B.R. 580.

Ben Floyd, Bonham, Carrington & Fox, Houston Tex., for Trustee W. Steve Smith.

Martin Paul Solomon, New York City, David C. Unger, Houston, Tex., for defendant.

Robert C. Maley, Jr., Sheinfeld, Maley & Kay , Houston, Tex., for intervenor, receiver of Empire Life Ins. Co.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CARL O. BUE, Jr., District Judge.

The perplexing issue before the Court concerns the extent to which property that a debtor purports to designate as his homestead under Texas exemption laws may be set aside by the Trustee in bankruptcy as the subject of voidable fraudulent conveyances under the bankruptcy code. For the reasons set forth below, the Court concludes that on the facts of this case, the remedies requested by the Trustee run afoul of the Texas Constitutional protection afforded a homestead and may not properly be awarded to the Trustee and Intervenor.

Findings of Fact

A stipulation of facts was initially presented to the Court. The Court has adopted the stipulation and subsequent to finding of fact number 40, the Court has made further findings.

1. At all times material hereto, Defendant was the sole shareholder of Shearn Moody Holding Company ("SMHC"). Accordingly, all of the shares of stock of SMHC were property of Defendant's bankruptcy estate.

2. At all times material hereto, Defendant was also an officer and director of SMHC.

3. Prior to the incorporation of SMHC, the Defend-

ant acquired approximately 575 acres of real property on the western end of Galveston Island in three, or possibly four, separate transactions. The Defendant acquired the bulk of the property from Robert I. Cohen, Inc. by Deed dated and recorded May 6, 1960 (Exhibit 1). This transaction was partly for cash and partly financed by Trust 42A for the Defendant's benefit. In May of 1972, when the Defendant became of age pursuant to the terms of Trust 42A, each of the three trustees executed warranty deeds conveying the tracts of land acquired from Robert I. Cohen, Inc. to the Defendant (Exhibits 9, 10 and 11). The Defendant acquired another portion of the tract from B. Wittjen and Gaddis Wittjen by Deed dated July 21, 1967 (Exhibit 7). The Defendant acquired another portion of the tract from National Western Life Insurance Company after the Defendant paid off an investment made by the Defendant and others following the default of the other investors. This was accomplished by Deed dated December 29, 1969 (Exhibits 2, 3, 4, 5 and 6). Finally, the Defendant acquired a portion of the tract from Robert I. Cohen's aunt, Mrs. Gladys C. Blum. Joe Max Taylor acquired the property from Mrs. Gladys C. Blum, and subsequently deeded it to the Defendant on April 24, 1970 (Exhibit 8).

4. In 1972, the Defendant's privately chartered bank, W.L. Moody (Unincorporated) & Co. Bankers, was placed in receivership by the Securities and Exchange Commission. Members of the Defendant's family advanced funds necessary to pay off the depositors. To secure these advances, the defendant gave a mortgage on the entire tract of land to these members of his family (Exhibit 12). As the assets of W.L. Moody were liquidated, the monies advanced to pay off the depositors were repaid to these members of Defendant's family.

5. On January 5, 1973, SMHC was incorporated by

the Defendant's brother, Robert L. Moody, acting pursuant to a Power of Attorney granted to him by the Defendant during the Defendant's illness.

6. Part of the capitalization of SMHC came from assets remaining after the dissolution of another one of Defendant's life insurance companies, Empire State Life Insurance of Empire State Life Insurance Company were reinsured by a life insurance company belonging to Robert L. Moody, National Western Life Insurance Company ("National Western"). The remaining assets after dissolution were transferred to SMHC. Among the assets transferred were three-fifths (3/5ths) of one-eighth (1/8th) life estate interest in the Libby Shearn Moody Trust ("Trust 57").

7. On August 1, 1973, there remained due and owing to the Defendant's family members the sum of Nine Hundred Twenty-Three Thousand, Seven Hundred Thirteen and 75/100 Dollars—($923,713.75). On that date, Defendant executed a promisory note made payable to National Western in that amount for a loan which was used to pay off Defendant's family members (Exhibit 47). To secure this transaction, the Defendant executed a deed of trust (the "mortgage to National Western" or the "National Western Mortgage") on the following described real estate to National Western (Exhibit 17):

TRACT NO. 1:

Lots 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 45 and 46 in Section No. 2, Trimble & Lindsey Survey, Galveston Island, Galveston County, Texas, and Lots 93, 437, 446, 447, 454, 455, 456, 457, 466, 467, 468, 469, 474, 475, 476, 477, 481, 486, 487, 489, 494, 495, 496, and 497 in Section 1, Trimble & Lindsey

Survey, Galveston Island Galveston County, Texas.

That portion of all unopened and previously dedicated County roadways which have heretofore, by appropriate action of the County Court of Galveston County, Texas, been abandoned, which lie between or which are contiguous to the lots in Section No. 1 and No.2, Trimble & Lindsey Survey, Galveston Island, Galveston County, Texas.

TRACT NO. 2:

Lot 473 and the South 1515.13 feet of the West 230 feet of Lot 470, Section 1, Trimble & Lindsey Survey, Galveston Island, Galveston County, Texas.

TRACT NO. 3:

The East one-half(½) of Lot 389 and the North 493.9 feet of the West 245 feet of Lot 374, Section 1, Trimble & Lindsey Survey at Galveston Island, Galveston County, Texas.

TRACT NO. 4:

The surface only of Lots 114 and 115 in Section 2, Trimble & Lindsey Survey of Galveston Island, Galveston County, Texas.

8. The Defendant excepted from the mortgage to National Western a ten acre parcel of land, generally described as a tract of land located in Lots 36, 25, 16, and 5, in Section 2 and Lots 497, 496, 486 and 487 in Section 1 in the Trimble & Lindsey Survey of Galveston Island, Galveston County, Texas (the "ten acre tract").

9. The loan from National Western was guaranteed by SMHC (Exhibit 16). To further secure the loan from National Western, SMHC collaterally assigned a life insurance policy on the Defendant's life (Exhibit 15) and a one-fifth (1/5th) of one-eighth (1/8th) life estate interest in

Trust 57 (Exhibit 18).

10. Pursuant to agreements by and between National Western, SMHC, the Defendant and Moody National Bank as trustee of Trust 57 (Exhibits 14-19), the semi-annual distribution attributable to this assigned life estate interest was forwarded directly to National Western. National Western in turn would pay the semi-annual installment due on the loan, any premium due on the life insurance policy, and all ad valorem taxes on the entire tract of land owned by the Defendant. The net proceeds remaining after such payments were remitted to SMHC and distributed to the Defendant in the form of dividends.

11. At all times material hereto, all payments on the mortgage to National Western and ad valorem taxes were paid in the manner set forth in the preceding paragraph.

12. Also in 1972, the Intervenor and others filed a securities suit against the Defendant in the United States District Court for the Northern District of Texas. At all times material hereto, this litigation was pending before the United States District Court for the Northern District of Texas, the Fifth Circuit Court of Appeals and/or the United States Supreme Court.

13. The Intervenor obtained a mult-million dollar jury verdict on December 30, 1976 in the Federal District Court in the Northern District of Texas.

14. Thereafter, on January 24, 1977, the Defendant conveyed the approximate 565 acres of land described in the mortgage to SMHC by an Assumption Deed (the "1977 Assumption Deed") (Exhibit 22).

15. Additionally, on September 7, 1977, the Defend-

ant, in his capacity as President and sole shareholder of SMHC, mortgaged the entire approximate 575 acre tract (described in Admission of Fact Numbers 7 and 8 above) to TEAC Finance Consortium in order to secure a six million dollar line of credit that was to be established (Exhibits 23-27). Although no funds were extended under the line of credit, the mortgage has not been released, and Defendant never made demand upon TEAC to release the mortgage.

16. On January 4, 1979, the Defendant executed and recorded a Designation of Homestead covering 199.56 acres (the "first homestead designation") (Exhibit 30). The first homestead designation included the 100 acre tract hereinafter described in paragraph 18.

17. On May 29, 1979, the Receiver obtained the entry of a judgment in the amount of $6,319,000.00 against the Defendant (Exhibit 43).

18. On June 27, 1979, the Defendant executed another Designation of Homestead covering one hundred acres, more or less, which was recorded on June 28, 1979 (the "second homestead designation") (Exhibit 29). The second homestead designation included the ten acre tract that was initially excepted from the mortgage to National Western. The second homestead designation recites on its face that it was to be effective only if the first homestead designation was ineffective.

19. The Defendant filed various post-judgment motions in the Intervenor's suit, which were ultimately overruled on January 9, 1980. The Defendant then filed his notice of appeal of the Intervenor's judgment on February 6, 1980.

20. Subsequent to the entry of the Intervenor's Judg-

ment, the Defendant made a number of transfers to one James A. Stoker.

21. The Defendant executed a Warranty Deed of Gift to Mr. Stoker consisting of an undivided one-half (½) interest in the 10 acre tract included in Defendant's second homestead designation (Exhibit 36). The Warranty Deed of Gift states on its face that it was executed on October 10, 1979. However, it was not recorded until January 25, 1980, after Defendant's post-judgment motions referenced above were overruled.

22. The Defendant executed an Agreement Creating Right of Survivorship in Joint Tenancy Property in favor of Mr. Stoker on October 10, 1979, respecting the ten acre tract which also was not recorded until January 25, 1980, after the post-judgment motions were overruled (Exhibit 31.).

23. On April 1, 1980, the Defendant executed a Deed of Gift-Life Estate granting Mr. Stoker a life estate in the remaining undivided one-half (½) interest in the ten acre tract which was recorded on August 11, 1980 (Exhibit 37).

24. Both the October 10, 1979 Warranty Deed of Gift and the April 1, 1980 Deed of Gift-Life Estate were subject to conditions subsequent which had not occurred as of November 14, 1983. (The conditions provided that Stoker would maintain the property as his permanent home and that he would not transfer his interest in any way or the conveyance would not be effective.)

25. On April 1, 1980, James A. Stoker executed a Designation of Rural Homestead covering the ten acre tract which was recorded on April 11, 1980 (Exhibit 34).

26. Also on April 1, 1980, the Defendant executed a declaration of Trust conveying the ten acre tract into a trust (Exhibit 33). The Trust was not to be effective unless James A. Stoker predeceased the Defendant. An instrument attempting to revoke the trust was executed by the Defendant on May 13, 1983 (Exhibit 45). However, the revocation was not recorded until after the filing of the Defandant's initial Chapter 13 case on the Southern District of Texas.

27. Also on April 1, 1980, the Defendant executed a Warranty Deed conveying to Shearn Moody, Jr. Trustee, all oil, gas, and other minerals, and mineral interests, and all royalty interests, which Defendant then owned in any land situated in Galveston County, Texas (Exhibit 32). No independent evidence was produced to demonstrate the purpose or reason for this transaction.

28. On March 18, 1982, the Defendant executed the 1982 Assumption. Deed, whereby the 565 acre tract previously conveyed to SMHC by the 1977 Assumption Deed was again conveyed and/or reconveyed to SMHC, this time less one hundred acres, as opposed to the previous reservation of ten acres. The one hundred acres that was reserved is the same property described in the second homestead designation.

29. On March 7, 1983, the Defendant, in his capacity as President and sole shareholder of SMHC, executed the 1983 Warranty Deed, conveying two hundred acres from SMHC to himself. The two hundred acres conveyed by SMHC to Defendant under the 1983 Warranty Deed included most, but not all, of the property described in the first homestead designation, some of which remained titled in SMHC.

30. On the dates of the execution and recordation of the 1982 Assumption Deed and the 1983 Warranty deed, Defendant gave no consideration to SMHC in exchange for the transfers effected by the 1982 Assumption Deed and the 1983 Warranty Deed.

31. On the dates of the execution and recordation of the 1982 Assumption Deed and the 1983 Warranty Deed, the Defendant was insolvent and did not have sufficient assets within the State of Texas subject to execution to pay off his debts.

32. On the date of the execution and recordation of the 1982 Assumption Deed and 1983 Warranty Deed, Intervenor, Empire Life, Reynolds, White, Allen & Cook and Graves, Daugherty, Hearon & Moody, were creditors holding unsecured claims allowable under 11 U.S.C. § 502.

33. On March 25, 1983, the Defendant executed a Designation of Homestead (Exhibit 42) covering the two hundered acres described in the 1983 Warranty Deed which was recorded on March 29, 1983, under Clerk's File Number 8310617 (the "third homestead designation").

34. Thereafter, Defendant executed another Warranty Deed (Exhibit 41) conveying the two hundred acres described in the 1983 Warranty Deed to Shearn Moody, Jr., Trustee which was recorded on March 29, 1983, under Clerk's File Number 8310618.

35.On April 1, 1983, Defendant executed another Warranty Deed (Exhibit 43) conveying all oil, gas, or other minerals, or any mineral estate which he then owned, or might own in Galveston County, Texas to Shearn Moody, Jr., Trustee, which was recorded on April 11, 1983.

36. On May 13, 1983, the Defendant executed another Warranty Deed (Exhibit 44) conveying all the minerals owned by the Defendant in, on, or under the two hundred acres described in the 1983 Warranty Deed to Shearn Moody, Jr., Trustee, which was recorded on June 28, 1983, after the Debtor's initial Chapter 13 filing in the Southern District of Texas.

37. On June 6, 1983, the Defendant filed his original voluntary petition under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas-Houston Division.

38. The Defendant dismissed his original Chapter 13 case on November 10, 1983 and refiled another Chapter 13 case on November 14, 1983 in the United States Bankruptcy Court for the Middle District of North Carolina. It is this second case which, after conversion to Chapter 11, change of venue and withdrawal of reference, currently pends before this Court as Civil Action No. H-86-2314.

39. Defendant's second Chapter 13 petition reflected that, on November 14, 1983, Defendant resided at 3525 Mayfair, Apt. 207, Durham, North Carolina 27707 (Exhibit 49).

40. Since the execution of the National Western Mortgage, SMHC paid all of the payments of the National Western mortgage and SMHC paid all of the ad valorem taxes on the approximately 575 acre tract.

41. The 1982 Assumption Deed is an attempt by the Debtor to correct the conveyance of land previously conveyed to SMHC by the 1977 Assumption Deed.

42. No cogent evidence was presented by the Debtor

justifying the purposes for the confusing and contradictory transfers of real property by the Debtor or his corporation SMHC.

43. The procedural history and record demonstrate that the transfers from SMHC to the Defendant and vice-versa were done at a time when the Intervenor Creditor was attempting to execute on the Debtor's assets.

44. The multitude of transfers were made by the Debtor or his agents acting on his requests.

45. The Debtor's conduct throughout the various land transactions described previously evidences a fraudulent intent to conceal property from execution by his primary creditor, Empire Life Insurance Co.

46. The Debtor's conduct also shows that he intended to make the two hundred acre tract designated in the second and third homestead designations his Texas homestead. The two hundred acres included in the third homestead designation are valued at a substantially greater value than the remaining acreage which is currently property of the bankruptcy estate.

47. With the exception of his sojourn in North Carolina during an extended period of illness, the Debtor has consistently resided at 2601 Eight Mile Road, Galveston, making it his permanent residence since its purchase in the 1960's.

48. The two conveyances attacked by the Trustee and Intervenor are transfers of real property that the Debtor claims as a rural homestead exempt from the claims of a judgment creditor pursuant to the Texas Constitution.

49. The Trustee's sole purpose in this suit is to procure for the bankruptcy estate and for the creditors the benefit of the approximately two hundered acres which the Debtor claims as his homestead.

50. Objections by the Intervenor and the Trustee to the Debtor's claimed homestead exemptions are currently the subject of another proceeding, H-86-2314. Therefore, the precise extent to which the Debtor is entitled to a homestead has yet to be decided.

Conclusions of Law

1. Jurisdiction is uncontested and exists by virtue of the withdrawal of reference from the bankruptcy court in Debtor's Chapter 11 proceeding in Civil Action H-86-2314 pursuant to 28 U.S.C. § 157 and 1334, 11 U.S.C. § 544 and 548.

Fraudulent Conveyances

[1] 2. The Bankruptcy Code provides in § 548(a)(2) that the Trustee may avoid an interest of the Debtor in property that was made or incurred on or within one year before the date of the filing of the petiton if the Debtor voluntarily or involuntarily (A) received less than a reasonably equivalent value in exchange for such transfer; and (B) was insolvent on the date that such transfer was made.

(3) At first glance, the March 7, 1983 Warranty Deed falls within the statute. The Debtor's Chapter 13 petiton was filed in North Carolina on November 14, 1983. Therefore, the transfer was made within one year before the filing date. The Debtor, however, argues that the purpose of the fraudulent conveyance statutes is to avoid transfers by the Debtor to another, technically, "out from the

debtor," and therefore, because the March 7, 1983, Warranty Deed conveyed land from SMHC to the Debtor, the statute is inapplicable. While this reasoning possesses some technical validity, it essentially places form above substance. The bankruptcy code defines the term "transfer" broadly. 11 U.S.C. § 101(48) defines transfer as every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the Debtor's equity of redemption.

Based on the facts and circumstances in this case, the transfer of property from SMHC to the Debtor initially falls within the fraudulent conveyance statute. The Court may also disregard the corporate entity of SMHC where it is apparent that SMHC was merely used as a conduit to enable the Defendant to transfer the property. *Rudin v. Steinbugler*, 103 F.2d 323 (2d Cir. 1939); *Irving Trust Co. v. Kaminsky*, 22 F.Supp. 362 (S.D.N.Y.1937); *Merriam v. Venida Blouse Corporation*, 23 F.Supp. 659 (S.D.N.Y.1938). *Bush v. Gaffney*, 84 S.W.2d 759 (Tex.Civ.App.—San Antonio 1935, no writ).

4. Section 548(a)(1) permits the Plaintiff to avoid any transfer of an interest of the Debtor in property that was made in or within one year before the date of the filing of the petition if the Debtor voluntarily or involuntarily made such transfer with actual intent to hinder, delay, or defraud any entity to which the Debtor was or became indebted on or after the date that such tansfer was made.

5. Under Section 548, fraudulent intent may be inferred from facts and circumstances in the record pointing to the conclusion that the Debtor's actions were motivated by intent to hinder, delay or defraud creditors. *See, e.g., In*

the Matter of Life Science Church of Riverpart, 34 B.R. 529 (Bankr.N.D.Ind.1983); *In the Matter of Commercial Candy Company*, 20 B.R. 292 (Bankr.W.D.Mo.1982). The pendency of a lawsuit or an actual judgment held by a creditor is another indication that actual fraud is present. *In re Kaiser*, 722 F.2d 1574 (2d Cir.1983).

6. The record is replete with indicia of fraud. The intervenor's judgment became final on May 29, 1979 after the judgment was affirmed by the Fifth Circuit and the Supreme Court. The March 7, 1983 warranty deed was executed approximately two months prior to the Defendant's initial Chapter 13 filing in the Southern District of Texas in June 1983. The transfer was made therefore in contemplation of bankruptcy with the intent to hinder execution of the judgment held by the Intervenor.

7. The Court takes judicial notice of the Findings of Fact and Conclusions of Law of the Bankruptcy Court entered on September 13, 1985 in which the Hon. Letitia Taitte Clark found that numerous transfers including the 1983 Warranty Deed appeared to have been done without any business or rational purpose and appeared to have been designed for the sole purpose of placing assets beyond the reach of the Defendant's creditors. Findings of Fact 78-82.

8. Plaintiff relies on 11 U.S.C. § 544 as an alternative to set aside the two conveyances. Under that section, the Trustee may avoid any transfer of an interest of the Debtor in property that is voidable by applicable law by a creditor holding an unsecured claim. Applicable state law is incorporated into § 544.

9. Section 24.02 and 24.03 of the Texas Business and Commerce Code are similar to 11 U.S.C. § 548(a)(1), providing that a transfer is void if it is intended to delay,

hinder or defraud a creditor. Similar "badges of fraud" indicate the existence of fraudulent intent. **See, e.g., Texas Sand Co. v. Shield,** 381 S.W.2d 48 (Tex. 1964) (existence of pending suit at time of transfer); *Kemp v. Metropolitan Life Ins. Co.*, 205 F.2d 857 (5th Cir.1953) (conveyances without consideration are presumptively fraudulent).

10. The Trustee is not entitled to recover monetary damages against Moody for the alleged fraudulent transfers pursuant to Tex.Bus.Com. Code Ann. §§ 24.02, 24.03 (Vernon 1968). Under the Texas fraudulent conveyance statute, the remedy afforded a successful claimant relates entirely to the Debtor's fraudulently transferred property and entails no personal liability on the part of those responsible for the transfer. *In re Mortgage America Corp.*, 714 F.2d 1266, 1272 (5th Cir.1983).

11. To the extent that the Trustee attempts to set aside the 1982 Assumption Deed pursuant to 11 U.S.C. § 548(a)(1), the transfer may not be attacked because the conveyance occurred on March 18, 1982, more than a year prior to the filing of the bankruptcy petition. More importantly, neither conveyance may be set aside under any of the statutes relied on by the trustee. As the Court will discuss more fully later in this order, conveyances of homestead property are not fraudulent as to creditors and may not be attacked by a judgment creditor or a bankruptcy trustee.

STATUTE OF LIMITATIONS

[2] 12. The Defendant argues that the Plaintiff's claims are barred by the statute of limitations. 11 U.S.C. § 546(a) governs the statute of limitations in a suit to avoid fraudulent conveyances. That section provides:

> An action or proceeding under Section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—
> (1) two years after the appointment of a trustee under Section 702, 1104, 1163 or 1302 of this title; or
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).

The Defendant argues that the two year time period commenced on November 14, 1983 when a trustee was appointed in the Chapter 13 case rather than on October 26, 1984 when a Chapter 11 Trustee was appointed in North Carolina. This suit was filed on October 16, 1986, and would be untimely if the statute ran from the appointment of the Chapter 13 Trustee.

Firm policy considerations and case law preclude dismissal of this case on a statute of limitations basis where concealment of assets and questionable transactions run rampant throughout the record. In a scholarly and well reasoned opinion, the Hon. Glen E. Clark held that the statute of limitations contained in 11 U.S.C. § 546(a) provides each trustee appointed under Chapter 7, 11 or 13 two years within which to commence avoidance actions. *In re AFCO Development Corp.*, 65 B.R. 781 (Bankr.D.Utah 1986).

The Court noted that while statutes of limitations are intended "to deter would be plaintiffs from sleeping on their rights." *See, Crown Cork & Seal Co. v. Parker*, 462 U.S. 345. 342, 103 S.Ct. 2392, 2396, 76 L.Ed.2d 628 (1983), such considerations become somewhat attenuated in a bankruptcy context. Preference and avoidance litigation entail uncertainty because a Chapter 11 case may remain open for many years before conversion to Chapter 7. 65

B.R. at 785.

The Court pointed out that the functions of a Chapter 13 Trustee are primarily administrative in nature and seldom exercise avoiding powers for the estate. *See, In re Ciavarella*, 28 B.R. 823 (Bankr.S.D.N.Y. 1983); *In re Walls*, 17 B.R. 701 (Bankr.S.D. W.Va.1982). If the Chapter 13 trustee failed to exercise the avoiding powers, a subsequent trustee and creditors would be seriously prejudiced in a superseding Chapter 7 case. 65 B.R. at 787.

13. *In re AFCO, supra*, is easily applicable to this case. The multifarious actions of the Debtor and his agents have resulted in one of the most protracted and complex Chapter 11 proceedings in bankruptcy history. The Court takes judicial notice of the record in H-26-2314 and the many instances of fraudulent concealment observed by the two bankruptcy courts that presided over this case prior to the withdrawal of reference. To preclude the chapter 11 trustee from attempting to set aside these transactions based solely on a limitations argument flies in the face of equity and law as enunciated in *In re AFCO*. This action is therefore timely under 11 U.S.C. § 546(a).

COLLATERAL ATTACKS

[3] 14. The Defendant also argues that this lawsuit to set aside fraudulent conveyances is actually a collateral attack on Moody's claimed homestead exemption and is therefore untimely under Federal Rule of Bankruptcy Procedure 4003(b) which requires that objections to property excluded as exempt must be filed within 30 days after the conclusion of the meeting of creditors unless, prior to the expiration of the 30 day period, the Court extends the time. Moody claims that because this adversary proceeding was not commenced until October 16, 1986, two years after the

creditor's meeting, it should be dismissed as an untimely collateral attack upon Moody's designation of exempt real property. *See, e.g., Matter of Weisner,* 39 B.R.963 (Bankr.W.D.Wis.1984) (Trustee's application for appraisal of property claimed by debtor as exemptions and barred due to Trustee's failure to timely object); and *In re Walsh* 5 B.R. 239 (Bankr.D.C.1980).

The trustee, however, correctly adopted in writing the timely filed objection to the claimed homestead exemption of the intervenor. *In re Keyworth,* 47 B.R. 966, 970 (D.Colo.1985) (trustee who failed to file timely objections allowed to join in objections timely filed by a creditor), *ef. In re Floyd,* 37 B.R. 890 (Bankr.N.D.Tex.1984) (creditors not permitted to "piggy-back" on a motion to extend time to file a complaint to deny discharge filed by another creditor where each complaint involved a separate debt); and *In re Kasishke,* 40 B.R. 712, 714 (Bankr.N.E.Tex.1984) (Anti-"piggyback" rule adopted to prevent trustee who orally objected to debtor's exemptions but failed to timely file written objection from filing a complaint to deny discharge. The Court, however, noted that debtor's actions in selling home before homestead exemptions were determined did not merit the relief sought by the trustee).

15. The Court declines to routinely apply the anti-piggy back rule that the Debtor urges. Again, the record demonstrates the Debtor's utter lack of cooperation with the Trustee from the onset. To preclude the Trustee from adopting the Intervenor's timely objection requires that the Court ignore the deception and concealment apparent in the case. The Court notes, however, that the anti-piggy back argument is more appropriately made in the C.A. H-86-2314 where the objectin to Moody's claimed homestead exemption pends.

16. Although the record demonstrates sufficient evidence for the Court to conclude at first blush that the conveyances fall within the fraudulent conveyances statutes cited by the Trustee because the conveyances include homestead property, they are not fraudulent as to creditors. For the reasons set forth below, the Trustee and Intervenor may not set aside these transactions as fraudulent conveyances, nor may the Plaintiffs impose an equitable lien or constructive trust on property claimed as homestead under Texas Law.

The Texas Homestead Exemption

17. The Trustee seeks rescission of the two deeds, the 1982 Assumption deed and the 1983 deed from SMHC to Moody based on a finding of fraud, and the imposition of an equitable lien and a constructive trust on the property covered by the two deeds. The practical effect of the remedies sought would be to re-vest title to the land in SMHC, now known as BOI which has been determined to be property of the bankruptcy estate by Bankruptcy Judge Clark. The Debtor argues, however, that the remedies sought by the Trustee are barred by the Texas constitutional protection afforded to a homestead.

The Debtor also asserts that this entire cause of action represents in actuality a collateral attack on Moody's claimed homestead exemption. To the extent that the Trustee seeks to divest Moody directly of any homestead interest he may be entitled to, the Debtor, argument is meritorious. However, merely because the subject deeds involve land designated as homestead does not entirely bar the Trustee's claim prior to trial. Sufficient questions of fact existed and the Trustee was properly permitted to present evidence of the alleged fraudulent transfers to demonstrate the estate's entitlement to relief, if at all.

18. In Texas, a homestead is defined and prescribed by Article XVI, § 51 of the Texas Constitution, which provides:

> The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village shall consist of a lot or lots amounting to not more than one acre of land, together with any improvements on the land.

19. Article XVI § 50 goes on to provide that no mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money. Article XVI § 50 prohibits the forced sale of a homestead for any purpose other than purchase money liens, improvement liens or taxes. Tex.Const. Art. XIV § 50.[1]

20. Under Texas law, land properly claimed as homestead is exempt from execution by judgment creditors, and a debtor may convey homestead property free and clear of judgment liens. *Englander v. Kennedy*, 424 S.W.2d 305 (Tex.Civ.App.—Dallas) writ ref'd n.r.e., 428 S.W.2d 806 (Tex.1968).

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[1] The relevant portion of Article § 50 of the Texas Constitution states:

> "The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead ... No mortgage shall ever be valid, except for the purchase money therefor, or improvements made thereon, as herein-before provided...."

21. The provisions of the bankruptcy code contained within 11 U.S.C. § 541 provide that upon commencement of a case, all property of the debtor becomes property of the estate. However, once the debtor's property becomes property of the estate, the debtor is entitled to exempt certain property. *In re Graham,* 64 B.R. 469 (Bankr.S.D.Tex.1986).

22. The Trustee relies upon *In re Kasishke, supra,* arguing that fraudulent transfers of real property may be set aside because Moody's homestead has not yet been determined, and therefore he does not have a valid allowed exemption. *In re Kasishke* does not support the Trustee's contention. The debtors in *Kasishke* sold a residence which was claimed as homestead prior to the time a ruling was rendered on an objection to the exemption. The Court held that the debtor had no power to transfer the property without the approval of the trustee and could not "jump the gun" and dispose of exempt property after the case was filed but prior to the time the exempt property had been removed from "property of the estate." Under 11 U.S.C. § 362, the Court held the debtors in contempt and ordered them to pay the trustee attorney fees in the sum of $350. The trustee also sought to deny the debtors discharge because of the transfer. The Court refused the requested relief, determining it to be too drastic under the rather inconsequential circumstances of the case. 40 B.R. at 714.

The Bankruptcy Court in *Kasishke* clearly did not hold that the debtors were not entitled to the homestead exemption because the objection had not been ruled on yet when the transfer was made. In fact, the Court explicitly referred to the property as exempt property in spite of the fact that the objection had not been ruled on. 40 B.R. at 714. The Trustee is not entitled to rely on *Kasishke* to effectively nullify the Debtor's claim that the property is subject to a homestead exemption.

23. Sitting as a court of equity, this Court has no power to deprive an individual of valid existing legal rights.

24. 11 U.S.C. § 522 provides that an individual debtor may exempt property from the bankruptcy estate that is applicable under the relevant state, federal or local law.

25. In Texas, liberal views prevail with respect to exemption claims. *Meritz v. Palmer*, 266 F.2d 265 (5th Cir.1959).

26. A debtor has a right to a prompt determination of his exemptions. *In re Hilmoe*, 56 B.R. 262 (Bankr.D.S.D.1985); *In re Waters*, 22 B.R. 387 (Bankr.N.D.Tex.1982).

27. The Trustee may not take advantage of the delays and inefficiencies that resulted from the bankruptcy court's crowded docket by arguing that the Debtor's homestead exemption has not yet been allowed when this Court will shortly rule on the question. Nor may the Trustee rely upon the complexity of the case to employ this argument as a tactical maneuver to preclude determination of Moody's exemptions.

[4] 28. Assuming therefore for the purposes of this proceeding ony that Moody is entitled to claim some portion of the deeded acreage as his Texas homestead, the Court concludes that the Trustee may not enforce an equitable lien on the claimed homestead property in spite of the fact that Moody's machinations may have been prompted by the desire to remove his assets from executin by creditors.

29. Texas courts strongly disapprove of the imposi

tion of equitable liens and constructive trusts on homestead property where constitutional and statutory requirements for imposing liens on homestead property are not complied with.[2] *Matter of Daves*, 770 F.2d 1363 (5th Cir.1985)

30. Under narrowly limited circumstances, Texas Courts will impose an equitable lien against homestead property. The rationale for imposing and enforcing an equitable lien against any property, including a homestead, is that an entity from whom the funds were wrongfully taken as a pre-existing interest in the homestead. This is so because the property taken never belonged to the wrongdoers. *Baucum v. Texam Oil Corp.*, 423 S.W.2d 434 (Tex.Civ.App.--El Paso 1968, writ ref'd n.r.e.). The equitable lien arises at the moment the funds are wrongfully taken, as the funds are already subject to a constructive trust at the time they are used to purchase the homestead or improvements thereon. *In re Lodek*, 61 B.R. 66 (Bankr. W.D.Tex.1986).

31. In deciding whether to impose an equitable lien on homestead property, Texas courts distinguish between

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[2] The Texas Property Code sets forth the procedure to be followed for the valid imposition of a lien on homestead property. § 53.059 provides:

(a) To fix the lien on a homestead, the person who is to furnish or perform labor and the owner must execute a written contract setting forth the terms of the agreement.

(b) The contract must be entered before the material is performed.

(c) If the owner is married, the contract must be signed by both spouses.

(d) The contract must be filed with the county clerk of the county in which the homestead is located, who shall record it in records kept for that purpose.

(e) If the contract is made and recorded by an original contractor, the contract inures to the benefit of all persons who labor or furnish material for the original contractor.

Texas Property Code (West 1984)

homesteads acquired with fraudulently obtained moneys and those that are merely augmented or improved with wrongfully acquired funds. In the former case, a constructive trust or equitable lien will be imposed because the constructive trust is initially declared to exist on the stolen funds, and the trust property may be traced in its mutations to property purchased with the stolen funds, provided that the property can be identified and is not a previously existing homestead. *Bush v. Gaffney*, 84 S.W.2d 759 (Tex.Civ.App.—San Antonio 1935, no writ); *Meyers v. Baylor University*, 6 S.W.2d 393 (Tex.Civ.App.—Dallas 1928, writ ref'd); *First State Bank of Ellinger v. Zelesky*, 262 S.W. 190 (Tex.Civ.App.—Galveston 1924, no writ); *Smith v. Green*, 243 S.W. 1006 (Tex.Civ.App.—Amarillo 1922, writ ref'd); *Baucum v. Texam Oil Corporation*, 423 S.W.2d434 (Tex.Civ.App.—El Paso 1968, writ ref'd n.r.e.); *Maryland Casualty v. Shroeder*, 446 S.W.2d 117 (Tex.Civ.App.—El Paso 1969, writ ref'd n.r.e.).

32. However, where stolen or fraudulently acquired funds are used to enhance an existing homestead, an equitable lien on the homestead will not be enforced. *Curtis Sharp Custom Homes Inc. v. Glover*, 701 S.W.2d 24 (Tex.App.—Dallas 1985, writ ref'd n.r.e.) (Constitutional provision prohibiting forced sale of a homestead prevented foreclosure of an equitable lien on property where funds embezzled from an employer were used to pay for improvements to the homestead).

33. Texas law is well settled that the disposition of property subject to execution for the purpose of procuring a homestead is not deemed a fraud upon creditors. *Swayne v. Chase*, 88 Tex. 218, 30 S.W. 1049 (1895); *Finn v. Krut*, 13 Tex.Civ.App. 36, 34 S.W. 1013 (1896); *Bell v. Beazley*, 18 Tex.Civ.App. 639, 45 S.W. 401 (1898); *Southern Irr. Co. v. Wharton Nat'l Bank*, 144 S.W. 701 (Tex.Civ.App. 1912);

Van Wagner v. Kruse, 221 S.W.2d 787 (Tex.Civ.App.—Eastland 1949, no writ).

34. Under the Texas statutes relating to fraud and fraudulent conveyances, a Texas debtor who is entitled to a homestead and a homestead exemption can appropriate all or part of his property to purchase a homestead, and his creditors cannot prevent his doing so, even though such action is for the purpose of and results in hindering, delaying and defrauding his creditors. *National Liberty Ins. Co. of America v. Merkur*, 29 F.Supp. 280 (S.D.Tex.1939).

35. As a general rule, to invalidate a gift or other voluntary conveyance as fraudulent, the property must be of a kind to which a creditor can resort for payment of his debts, and creditors cannot complain of transfer of property immune from seizure. *Citizens Nat. Bank at Brownwood v. Turner*, 89 F.2d 600 (5th Cir.1937); *Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801 (1956).

36. Where the sole purpose of a conveyance of exempt homestead property is to defraud creditors or place the land beyond their reach, a judgment creditor may not set aside the conveyance or foreclosure upon a lien on the property. *Van Wagner v. Kruse*, 221 S.W.2d 787 (Tex.Civ.App.—Eastland 1949, no writ) (where business homestead was conveyed from two husbands to two wives for the purpose of defrauding creditors, property was not subject to the husbands' debts); and *see Crow v. First Nat. Bank of Whitney*, 64 S.W.2d 377 (Tex.Civ.App.—Waco 1933, writ ref'd) (where wife conveyed her homestead interest to her son, creditor could not set aside the conveyance to satisfy the wife's debt).

37. The Fifth Circuit has more recently noted that Texas constitutinal and statutory protection of the

homestead is absolute, and the exemption may be allowed in full regardless of a debtor's intent. *In re Reed*, 700 F.2d 986 (5th Cir.1983) (hereafter Reed III).

38. The *Reed* series of cases, relied on by all parties is the subject of some confusion. In *Reed* , the debtor openly converted non-exempt assets, including a coin collection, guns, antiques and an interest in a corporation into cash for less than their actual value during a two week period prior to filing a Chapter 7 petition. The debtors used the cash to pay for improvements on their residence, pay an improvement loan and reduce the balance on a vendor's lien on the residence. *In re Reed*, 12 B.R. 41 (Bankr.N.D.Tex.1981) ("Reed I"). In *Reed I*, the trustee filed a complaint challenging the debtor's right to claim a homestead exemption due to the conversion of assets. The bankruptcy court denied the trustee's challenge to the homestead exemptions on the basis that the prohibition against forced sale of a homestead in the Texas Constitution precluded relief.

In Reed II, the bankruptcy court held that the conversion of non-exempt assets warranted the denial of discharge of all of Reed's dischargeable debts. 11 B.R. 689 (Bankr.N.D.Tex.1981). The District Court and the Fifth Circuit affirmed the debtor's denial of discharge on that basis. In *Reed* III, the Fifth Circuit, while ruling that a discharge was proper, used strong language to infer that although fraudulent intent was present, the homestead exemption could not be defeated by the eleventh hour conversion. 700 F.2d at 990.

In a footnote, the Court observed that the allowance of the exemption was not challenged, and as a result, the question of whether the exemption would be denied to property acquired with the intention of defrauding creditors did not need to be determined. 700 F.2d 986, 981 n. 2.

39. *Reed III* is clear warning that homestead exemptions will not be lightly construed. Although the Court appears to leave open the question of whether the homestead exemption would be allowed under Texas law where the purpose of its acquisition is to defraud creditors, the Texas authorities previously cited support the conclusion that any exemption Moody may be entitled to must be allowed free and clear of an equitable lien under these facts.

40. As the Court has previously noted, Moody acquired the property at 2601 Eight Mile Road in the 1960's with the intention of making the residence his permanent residence. Although Moody participated in the questionable and contradictory conveyances noted in the Findings of Fact, which he used to designate a homestead, no evidence was produced to demonstrate that Moody claimed a homestead elsewhere.

41. Under Texas law, to establish homestead rights, overt acts of homestead usage and intention to claim the land as homestead must be demonstrated. *Lifemark Corp. v. Merritt*, 655 S.W.2d 310 (Tex.App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); *Sims v. Beeson*, 545 S.W.2d 262 (Tex. Civ.App.—Tyler 1976, writ ref'd n.r.e.); *Prince v. North State Bank*, 484 S.W.2d 405 (Tex.Civ.App.—Amarillo 1972, writ ref'd n.r.e.).

42. Although the question of Moody's intent to maintain a homestead is the subject of C.A. No. H-86-2314, the Court finds that Moody intended to make the property his primary residence when the land was acquired in the 1960's.

43. Although the 1983 Warranty Deed purports to deed the two hundred acres to Moody, in reality, Moody had already acquired the land in 1964, at a time when no

evidence was produced to demonstrate that the land was acquired to defraud creditors. No evidence was presented to demonstrate that the designated homestead property was initially acquired with stolen funds. Accordingly, Texas law will not support the imposition of a constructive trust or equitable lien under these circumstances.

44. The purpose behind the purported re-conveyance under the 1982 Assumption Deed and the conveyance to Moody under the 1983 Warranty Deed was to attempt to enable Moody to designate a homestead on the reconveyed acreage. Applying the line of Texas cases previously discussed, the Trustee and Intervenor may not set aside these conveyances or foreclose upon an equitable lien on the property.

Denuding of Corporate Assets and Corporate Mismanagement

45. The Trustee seeks damages against Moody on the basis that as sole shareholder, officer and director of SMHC, Moody owed a fiduciary duty to SMHC which was breached when the 1982 and 1983 conveyances were made without consideration and without any justifiable business purpose. The Trustee claims that Moody's actions constitute waste and denuding of the corporate assets of SMHC.

The rationale behind the denuding theory is that a corporation cannot disable itself from responding for its debts by distributing its assets among its shareholders, leaving without remedies those having valid claims. Under those circumstances, a creditor injured by the distribution of assets may proceed by an appropriate suit against the stockholders to enforce payment of its claims against the corporation. *A.R. Clark Investment Co. v. Green*, 375 S.W.2d

425 (Tex.1964); *World Broadcasting System, Inc. v. Bass*, 160 Tex. 261, 328 S.W.2d 863 (1959); *Inesco Inc. v. Sears*, 567 S.W.2d 827 (Tex.Civ.App.—Beaumont 1978, writ ref'd n.r.e.).

[5] 46. A cause of action under the Texas corporate denuding theory, though usually brought by creditors, is an action in the right of the corporation, which is brought for the benefit of all creditors and shareholders. *In re Mortgage America Corp.*, 714 F.2d 1266, 1277 (5th Cir.1983).

47. Despite the fact that the action under normal circumstances is frequently not brought by the corporation itself, the courts have uniformly held that, upon bankruptcy, it passes to the trustee who is then charged with prosecuting it for the benefit of all creditors and shareholders. *In re Mortgage American Corp., supra* at 1276, *citing* 4 Collier on Bankruptcy § 541.-10[8] (15th ed. 1983); *Holahan v. Henderson*, 394 F.2d 177 (5th Cir.), *cert. denied*, 393 U.S. 848, 89 S.Ct. 136, 21 L.Ed.2d 119 (1968).

[6] 48. The Trustee, however, has failed to demonstrate his entitlement to prevail in such a cause of action. Assuming the Trustee is proceeding under 11 U.S.C § 544(b), the Trustee is vested with the status of an unsecured creditor of the debtor, Moody, not of SMHC. The Trustee has failed to demonstrate that any unsecured creditor of Moody would have such a cause of action against SMHC, and therefore the Trustee has no standing to maintain this claim. Even assuming that Empire Life Insurance Co., the major creditor in this case, had a claim against SMHC, the Court will not speculate and form counsel's theories where no evidence was presented to the Court to support a denuding theory.

[7] 49. The Trustee also sues on a derivative basis for

mismanagement of SMHC, on the ground that he has succeeded to 100• ownership of the stock of SMHC and may bring stockholder's claims incident to the ownership. It is not clear to the Court on what basis the Trustee relies; however, 11 U.S.C. § 541 permits such a claim because the bankruptcy estate has succeeded to Moody's interest in the SMHC stock, and to causes of action incident to the stock ownership. *Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir.1986).

50. The Trustee has failed to present evidence that Moody as sole shareholder of SMHC has any valid claim against SMHC that the estate may recover. In fact no evidence whatsoever was presented concerning the business dealings of SMHC and how Moody's actions as president and sole shareholder of SMHC damaged Moody individually.

51. To the extent a legal or equitable interest of a debtor in property is limited in the debtor's hands, it is equally limited in the hands of the trustee; Bankruptcy Code 11 U.S.C. § 541(a) does not vest the trustee with any greater property rights than a debtor holds at the time a petition is filed. *In re Joliet-Will County Community Action Agency*, 58 B.R. 973 (Bankr.N.D. Ill. 1986); *In re Intercontinental Sec. Corp.* 62 B.R. 16 (Bankr.N.D.Ill.1986).

52. The Trustee may not therefore recover on a corporate mismanagement claim where Moody himself would not be entitled to bring suit. *See generally, Bangor Punta Operations v. Bangor & A.R. Co.*, 417 U.S. 703, 94 S.Ct. 2578, 41 L.Ed.2d 418 (1974) for a discussion of the equitable doctrine that a shareholder may not complain of acts of corporate mismanagement if he acquired his shares from those who participated or acquiesced in the allegedly wrongful transactions.

53. With regard to any damages suffered by SMHC as a result of the transfers, the Trustee has failed to demonstrate that SMHC suffered any actual damages as a result of the conveyances.

54. Finally, the Trustee has not vigilantly pursued the corporate claims. For this and the reasons discussed, the Court declines to award the Trustee damages for the corporate theories propounded.

55. To the extent that any of the Findings of Fact are considered to be Conclusions of Law, they are adopted as such. To the extent that any of the Conclusions of Law are considered Findings of Fact, they are adopted as such.

CONCLUSION

56. The factual record contained in Moody's Chapter 11 bankruptcy is unsavory and paints an unprecedented picture of concealment, property manipulation, waste and fraud to preserve assets. The Court, however, is reluctantly constrained to deny the Trustee and Intervenor the remedies sought. While the conduct of Moody and his agents borders on the scandalous, Texas law simply does not support setting aside conveyances of lawfully procured property where the purpose of the conveyances is to designate a homestead protected by the Texas Constitution. The appropriate remedy for Moody's conduct is to consider the denial of discharge of all debts in bankruptcy at the appropriate time, rather than to grant the imposition of an equitable lien on property claimed as homestead in this suit.

Accordingly, the Plaintiff's request for relief is denied.

APPENDIX B

IN THE UNTED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-6073

FILED
MAR 2-1989

In The Matter Of: Shearn Moody, Jr.,
Debtor,

W. STEVE SMITH, Trustee,
Appellant,

and

JOHN S. GREENO, Receiver of Empire Life
Insurance Company of America,
Appellant,

versus

SHEARN MOODY, JR.,
Appellee.

No. 87-6078

In the Matter Of: SHEARN MOODY, JR.,
Debtor.

W. STEVE SMITH, Trustee, and JOHN S. GREENO,
Receiver of Empire Life Insurance Company,
Appellants-
Cross-Appellees,

versus

SHEARN MOODY, JR.,
Appellee-
Cross-Appellant.

Before CLARK, Chief Judge, JOLLY, Circuit Judge and POLOZOLA*

District Judge.

BY THE COURT :

IT IS ORDERED that Appellee's emergency motion to withdraw counsel to proceed pro se with authority in support of petition for rehearing is DENIED AS MOOT, the petitions for rehearing having been denied by the Court's order of February 16, 1989.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly

U. S. CIRCUIT JUDGE

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By: /s/ Illegible

Deputy MAR 27 1989
New Orleans, Louisiana

* District Judge of the Middle District of Louisiana sitting by designation.

APPPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-6073
87-6078

FILED
FEB 16 1989

In the Matter of Shearn MOODY, Jr.,
Debtor.

W. Steve SMITH, Trustee, Appellant, and
John S. Greeno, Receiver of Empire Life
Insurance Co. of America,
Appellant,

v.

Shearn MOODY, Jr.,
Appellee.

In the Matter of Shearn ,MOODY, JR.,
Debtor.

W. Steve SMITH, Trustee, and
John S. Greeno, Receiver of Empire Life
Insurance Company,
Appellants
Cross-Appellees,

v.

Shearn MOODY, Jr.,
Appellee
Cross-Appellant.

Appeal from the United States District Court for the Southern District of Texas

ON PETITIONS FOR REHEARING

(FEBRUARY 16, 1989)

Before CLARK, Chief Judge, JOLLY, Circuit Judge, and POLOZOLA,* District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby *DENIED*

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

* District Judge of the Middle District of Louisiana, sitting REHG-5 by designation.